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THE LAW
OF
WORKMEN'S COMPENSATION
Rules of Procedure, Tables, Forms,
Synopsis of Acts.

BY
WILLIAM R. SCHNEIDER, B. S., LL. B.,
of The St. Louis Bar.

AUTHOR
Missouri Workmen's Compensation Act, of 1919.

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BY

WILLIAM R. SCHNEIDER.

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26 NORTH WISCONSIN
CHICAGO
1922

PREFACE

TO
MY PARENTS
FREDERICK AND AUGUSTA SCHNEIDER.

PREFACE.

In the early part of 1917 three general legal works on the subject of Workmen's Compensation were published. Since then thirteen additional states have enacted compensation acts and the appellate court decisions on the subject have quadrupled.

The writer has been impelled to this work:

First: By reason of the important modifications of the general principles that have been evolved by the numerous decisions and new legislative enactments on this subject in the past five years. Twenty seven states having amended their respective compensation acts in 1921 alone.

Second: Because in this day "a case in point" usually takes precedence over the text writers' theories and deductions.

Third: Because the original reports are becoming so numerous that it is impossible for the practitioner to have more than a small fractional part of them at hand.

Hence this effort to supply to the practitioner, in the most convenient and comparatively inexpensive form, these three needs in so far as they relate to Workmen's Compensation Law. This has been attempted by mentioning throughout the work and in the synopses of the acts, included in the appendix, the amendments to the acts themselves, as well as the modifications of general principles that have been evolved by the decisions. In hundreds of cases those terse paragraphs from the opinions have been quoted which set out the gist of the facts and the law of the case, and in a few cases syllabii prepared by the court have been quoted.

It is hoped that these numerous quotations, together with the additional supporting citations and general subject matter, will prove a desirable substitute for the original report, and at the same time cover the particular point so comprehensively that the practitioner will be able to prepare his case with thoroughness.

PREFACE.

In view of the varying phraseology of the provisions of so many acts covering certain phases of the subject, this work must necessarily, in places, assume the nature of a digest of decisions.

A careful effort has been made to cite every American appellate court case on the subject in support of every point decided in the case. In addition many board and commission decisions and British and Canadian decisions have been cited and discussed.

The writer takes this opportunity to acknowledge his appreciation of the assistance rendered in the preparation of this work by the following:

C. C. Hine's Sons Company of 21 Platt Street, New York, publishers of the Workmen's Compensation Law Journal, which contains all current appellate court compensation cases, and is cited in this work as W. C. L. J.; Mr. Henry J. McMahon, a most thorough student of the subject of Workmen's Compensation; Mr. C. P. Berry, author of *Berry on Automobiles*, and contributor of articles on Workmen's Compensation to various legal journals; Mr. Clyde Gary and Mr. Charles Wright, all of the St. Louis Bar, and Mr. F. Robertson Jones of New York City.

WM. R. SCHNEIDER.

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EXPLANATION OF ABBREVIATIONS

- App. Div.**—Reports of the Appellate Division of the Supreme Court of New York.
- A. R. U. S. C. C.**—Annual Reports of United States Compensation Commission.
- Bull. Ohio Ind. Com.**—Bulletin of the Ohio Industrial Commission.
- B. W. C. C.**—Butterworth's Workmen's Compensation Cases (British) continuation of W. C. C.
- C. A.**—Chancery Appeals (British).
- Cal. Ind. Acc. Com.**—Reports of California Industrial Accident Commission.
- Conn. Comp. Dec.**—Decisions of the various Compensation Commissioners of the State of Connecticut.
- L. T.**—Law Times (British)
- K. B.**—King's Bench (British).
- Mass. Ind. Acc. Bd.**—Reports of the Massachusetts Industrial Accident Board.
- N. C. C. A.**—Negligence and Compensation Cases published by Callahan & Co., Chicago.
- Op. Sol. Dep. L.**—Opinions of the Solicitor of the Department of Labor, 1908 to 1915.
- S. C.**—Session Cases (British).
- S. L. R.**—Scottish Law Reports.
- W. C. A. Ins. Cas.**—Workmen's Compensation and Accident Insurance Cases (British Cases).
- W. C. C.**—Workmen's Compensation Cases (British).
- W. C. L. J.**—Workmen's Compensation Law Journal published by C. C. Hines Sons Company, 21 Platt Street New York.
- W. C. & Ins. Rep.**—Workmen's Compensation Reports (British Cases).
- W. C. R.**—Workmen's Compensation Reports (British Cases).

WORKMEN'S COMPENSATION LAW

VOLUME I

CHAPTER I.

REASONS FOR, HISTORY OF, AND OBJECTIONS TO WORKMEN'S COMPENSATION LAWS.

Sec.

1. Reasons Underlying Workmen's Compensation Legislation.
2. History of Workmen's Compensation Legislation.
3. Objections of Opponents of Compensation Laws.

§ 1. **Reasons Underlying Workmen's Compensation Legislation.**—Modern industrial development has in the past ten years impressed the economist and the legislator, more than ever before, with the rightful interest of the general public in industrial accidents.

It has become obvious that our common and statutory law is not sufficiently elastic and is too unscientific and uncertain to mete out even justice to the victims of these accidents. The result is, they frequently become public charges.

Statistics show that approximately forty per cent of the industrial accidents, causing disability are due neither to the fault of the employer nor the employee. Hence, this forty per cent of such accidents and the additional thirty per cent which are due principally, though not intentionally, to the fault of the employee, have not been compensated under our statutory and common law system, for the reason that compensation or damages under that system depends entirely upon establishing the fact of fault or negligence of the employer as the proximate cause of the personal injury. This means that approximately seventy per cent of the wage loss caused by disability, due to industrial or work accidents, is borne by the workers themselves.¹

1. *Lumberman's Reciprocal Ass'n v. Behnken*. (—Tex. Civ. App.—) 226 S. W. 154, 7 W. C. L. J. 363, places the non-compensable personal injuries suffered in industry under the common law system at eighty per-cent.

Though there seems to be no sound reason why they should bear that part of the cost of the finished product of an industry.

"The plain purpose of the compensation law is to make the risk of the accident one of the industry itself, to follow from the fact of the injury, and hence that compensation on account thereof should be treated as an element in the cost of production, added to the cost of the article and borne by the community in general."²

The scheme is to charge upon the business through insurance, the losses caused by it, making the business and the ultimate consumer of its product, and not the injured employee, bear the burden of the accidents incident to the business. The statute contemplates the protection, not only of the employee, but of the employer, at the expense of the ultimate consumer.³

The establishment of the fact of fault or negligence of the employer, under our common law system through an action in damages by the injured employee has been one of the thorns of that system, in that it "involves intolerable delay and great economic waste, gives inadequate relief, operates unequally and whether viewed from the standpoint of the employer or that of the employee, it is inequitable and unsuited to the conditions of the modern industry."⁴

It was with the view to remedy these multifarious evils and deficiencies of our statutory and common law system, as applied

2. *Kenny v. Union Ry. Co.*, 166 App. Div. 497, 152 N. Y. Supp. 117; *In re Duncan*, — Ind. App. —, (1920), 6 W. C. L. J. 148, 127 N. E. 289; *Nadeau v. Caribou Light & Power Co.*, — Me., — 108 Atl. 190, 5 W. C. L. J. 238; *Scotts Case*, — Me., — 104 Atl. 794, 3 W. C. L. J. 49; *Employer's Liab. Assur. Ass'n v. Indus. Comm.*, — Cal. —, 177 Pac. 273, 3 W. C. L. J. 407; *Wangler Boiler Co. v. Indus. Comm.*, — Ill. —, 122 N. E. 366, 3 W. C. L. J. 617; *Doey v. Clarence P. Howland Co.*, 120 N. E. 53, — N. Y. App. Div. —, 2 W. C. L. J. 669; *In re Cox*, 225 Mass. 220, 114 N. E. 281, 15 N. C. C. A. 271; *Bowne v. S. W. Bowne Co.*, — N. Y. App. Div. —, 116 N. E. 364, B1 W. C. L. J. 1183; *Mac Donald v. Employer's Liab. Assur. Corp.*, — Me. — (1921), 112 At. 719; *Devine's Case*, — Mass. —, (1921), 129 N. E. 414.

3. *Spratt v. Sweeney & Gray Co.*, 168 App. Div. 403, 153 N. Y. S. 505, 9 N. C. C. A. 918.

4. *Western Idemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1.

to industrial accidents, and establish in its place a more equitable and economically sound system, that our workmen's compensation laws have been enacted. The result has been most satisfactory in that injured employees receive immediate relief; a fruitful source of friction between employer and employee has been eliminated, due to the fact that compensation is in most cases fixed and definite, a tremendous amount of burdensome and expensive litigation has been eliminated, and a more harmonious relation between the employers and employees exists than was possible under the old system.

§ 2. History of Workmen's Compensation Legislation.—In 1883 a sick insurance statute was enacted in Germany with a view to alleviating the conditions due to the economic loss from industrial accidents, vocational disease, non employment and old age.

The first compensation law was enacted in Germany July 6th, 1884, and was amended from time to time and finally codified in its act of July 6th, 1911. There had been modifications, however, of the common or civil law of the countries of continental Europe that preceded the German Legislation. These modifications tended toward the evolution of the idea that industries should pay compensation to their disabled workers, on the basis of the risks arising out of the employment. The Gladstone Act of 1880 was England's first important modification of her law of the employers' liability for damage to injured employes; though her first compensation law was not enacted until 1897. The Austrian law antedates that ten years. Practically all the countries of Europe, the provinces of Canada and Australia had enacted their compensation laws ten years or more before the first attempt was made in the United States, which was the Federal Act of 1908. This act was of limited scope. Under it compensation was paid to artisans or laborers engaged in federal government construction work. Compensation in no case continued for longer than one year, and was not paid when it was shown that the employee had been negligent.

Massachusetts was the first state to take action on the subject of workmen's compensation. Its Legislature appointed a

commission to investigate the subject in 1903, but no compensation law resulted until 1911, in which year ten states⁵ enacted workmen's compensation laws. Montana in 1909 enacted a law applying to coal miners which was declared unconstitutional as was also the compulsory New York Act of 1910. Since the first ten states enacted their respective compensation laws in 1911, thirty-three of the other states of the union and three territories have also enacted similar laws.

The German compensation laws differ materially from the English and American laws in that the former are divided into three general divisions, sickness, accident and disability insurance.

The sickness fund takes care of the employee during the first thirteen weeks of disability caused by accident. This fund is collected in the proportion of one third from the employers and two thirds from the employees.

When the disability continues for more than thirteen weeks, compensation is paid out of the Accident Fund which is contributed and managed entirely by the employers. The disability insurance covers all other forms of disability, and the fund, therefore is contributed equally by employers and employees and is managed by representatives of both. There is, however, strict governmental supervision of the entire system.

The German law requires all employers to join the Accident Insurance Fund of their respective trades as a condition precedent to engaging in business.

In Great Britain the compensation act creates a personal liability which the employers may insure or not, as they deem best, though they usually insure in privately managed stock or mutual insurance companies and these are supervised in a general way by the government, just as the American companies are supervised by the various insurance departments of the different states.

The American compensation acts contain many of the essential features and phraseology of the British and Canadian acts, so that the British and Canadian decisions interpreting their

5. Cal. Ill., Kans., Mass., Nev., N. H., N. J. Ohio, Wash. and Wis.

own acts throw considerable light on the interpretation of the American acts, and will therefore be cited frequently in the following pages of this work.

§ 3. **Objections of Opponents of Compensation Laws.**—It is stated by the opponents of compensation laws, that they are arbitrary of application and that the compensation of ten to twenty dollars per week for stated periods or for life, in cases of permanent total disability, is inadequate when considered in the light of the liberal judgments for damages that are frequently obtained in personal injury cases under the common law system. They overlook or disregard the fact mentioned in Section one, that under the common law system approximately seventy per cent of the victims of industrial accidents do not receive any compensation or damages, while under the compensation laws every employee who suffers an accident, arising out of and in the course of the employment, receives a fixed and definite compensation, regardless of the question of fault or negligence. They further overlook the fact of the great economic waste usually attendant on obtaining a judgment in damages, such as disrupting the working organization of a plant or factory, by repeatedly requiring employee witnesses to be taken from their work and wait in court often for days at a time to give their testimony or attend court and have the case continued time after time for one reason or another, thus involving great inconvenience and expense. Another item of great expense under the common law system, is that of attorney's fees. These personal injury cases are usually taken by attorneys on a contingent fee basis of one third to one half of the amount recovered by settlement or suit, so that by the time the alluringly large judgment reaches the hands of the injured employe, the amount is not often larger than he would receive under the compensation law, not to mention the fact that under the compensation law, he would receive the compensation at the time of his disability, when he most needs it, rather than be compelled to wait from six months to three, four or five years, as is often the case under the common law system, and then never be certain whether he will receive it at all.

They say it is unfair that an injured employee who earns fifty dollars per week should receive compensation at the rate of ten to twenty dollars per week. Why should this difference not also be passed on to the ultimate consumer? It is considered that when an industry is paying its workmen such wages, the cost of industrial accidents is thereby paid in advance by the consumer to the worker. He is earning as much as many employers, and, like the employer, is expected to save part of his earnings for old age and periods of possible disability. Though the more potent and controlling reason is that it is socially unwise to pay the injured worker full wages, or enough to permit him to live in comparative comfort or even luxury during his period of disability, because of the encouragement to carelessness and to fraud and imposition through the tendency to malingering. The result being, that every industry would be compelled to carry a large false production cost represented by the payments made to such malingering workers. Experience has demonstrated that this condition becomes burdensome where the weekly compensation is large.

Bradbury in his work on workmen's compensation gives the source of much of the remaining opposition to compensation laws and the answer thereto, in the following paragraph, page 1, 3rd edition. "Until very recently it has been difficult for American lawyers to reconcile themselves to the fundamental changes which workmen's compensation laws accomplish in the principles underlying doctrines with which they have long been familiar. The declaration that an employer shall be responsible for injuries to his workmen, whether or not the master is at fault, has, until very recently, in most parts of the United States, met with almost instant opposition whenever it has been made. Nevertheless, the compensation principle, when carefully analyzed, undoubtedly rests on sound economic, legal and moral foundations. Testimony from foreign countries and a rapidly increasing fund of evidence from many of the States of the Union, prove that it is not taking the employer's property without due process of law to compel him to pay compensation to an injured workman, when the injury is due to a risk which

is necessarily incident to the business. An assertion to the contrary is an economic fallacy.''⁶

6. The Arizona Copper Co., Ltd. v. Hammer, 250 U. S. 400, 4 W. C. L. J. 321.

CHAPTER II.

ELECTION, REJECTION AND CONSTITUTIONALITY OF ACTS.

Sec.

4. Elective and Compulsory Acts, Constitutionality.
5. Constitutionality of Miscellaneous Provisions.
6. Presumption of and Notice of Election and Rejection.
7. Requirements as to Notice of Election.
8. Proof of Election.
9. Effect, Contractual Nature of Election and Duress.
10. Election, When Exempted By Having Less Than Stated Number of Employees.
11. Election By Farmers, Employers of Domestic Servants, Casual Employees And Outworkers.
12. Election as To Part Only Of Employees.
13. Election To Reject And Abolition Of Common Law Defenses.
14. Election By Minors and Minors Generally.
15. Election To Reject And Action For Damages.

§ 4. Elective and Compulsory Acts, Constitutionality.—

The Supreme Court of the United States has declared constitutional both the compulsory¹ and elective² form of act. There are only three states in which the first law enacted, was held unconstitutional.³ Since these decisions both state⁴ and federal

1. *Mountain Timber Co. v. Washington* (March 1917) 243 U. S. 219, 61 L. Ed. 685, 13 N. C. C. A. 927; *Camunas v. N. Y. & P. R. S. S. Co.* (1919) 171 C. C. A. 76.

2. *Hawkins v. Bleakly* (March 1917) 243 U. S. 210; 61 L. Ed. 678, 37 Sup. Ct. 255, 13 N. C. C. A. 959; *N. Y. Central R. R. Co. v. White* (March 1917) 243, U. S. 188, 13 N. C. C. A. 943, 61 L. Ed. 667, 37 Sup. Ct. 247; *Gauthier v. Penobscot Chemical Co.*, — Me. —, 1921, 113 Atl. 28.

3. *Ives v. South Buffalo Ry. Co.* (March 1911) 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, 1 N. C. C. A. 517, on the ground that it imposed upon employers a liability without fault or contract; *Cunningham v. North Western Improvement Co.*, 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720, held it denied to employers equal protection of the laws; *Kentucky State Journal v. Workmen's Compensation Board*, 161 Ky. 562, 162 Ky. 387, L. R. A. 1916 A. 402, 172 S. W. 674, L. R. A. 1916 B, 389 various grounds mentioned.

4. The following are leading cases in the state courts sustaining the constitutionality of the compensation acts of their respective States:

courts⁵ have uniformly sustained the general constitutional questions involved in the Workmen's Compensation Acts,

4 Continued.

5. *Hawkins v. Bleakley*, 220 Fed. 378; *Raymond v. Chicago, etc. R. Co.*, 223 Fed. 239.

Arizona—*Superior & Pittsburg Copper Co. v. Davidovich*, 19 Ariz. 402, 171 Pac. 127, 16 N. C. C. A. 801; 1 W. C. L. J. 727; *C. A. S. Co. v. Ujack*, 15 Ariz. 382; *Arizona Copper Co. v. Hammer*, 250 U. S. 400, 4 W. C. L. J. 321; *New Cornelia Copper Co. v. Espineza*, (Cir. Ct. of App.) (Ariz.), 268 Fed. 742; *Indus. Comm. v. Crisman* (Ariz.), 199 Pac. 390, 1921 Act unconstitutional.

California—*Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 10 N. C. C. A. 1, 151 Pac. 398; *Western Indem. Co. v. Indus. Comm.*, — Cal. —, 163 Pac. 60, 11 W. C. L. J. 222; *Metal Co. v. Pillsbury*, 156 Pac. 491, 172 Cal. 407;

Illinois—*Deibeikus v. Link Bolt Co.*, 251 Ill. 454, 104 N. E. 211; *Strom v. Postal Telegraph Co.*, 271 Ill. 544, 111 N. E. 555; *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173; *Casperis Stone Co. v. Indus. Comm.* — Ill. —, 115 N. E. 822.

Iowa—*Hunter v. Colfax Coal Co.*, 154 N. W. 1037, 11 N. C. C. A. 886, 175 Ia. 245.

Kansas—*Shade v. Ash Grove Co.*, 93 Kan. 257, 144 Pac. 249; *Hovis v. Cudahy Co.*, 95 Kan. 505, 148 Pac. 626.

Kentucky—*Greene v. Caldwell*, 186 S. W. 648, 150 Ky. 571.

Maine—*In re Mailman*, 118 Me. 172, 106 Atl. 396, *Fish's Case*, 118 Me. 489, 107 Atl. 32, 4 W. C. L. J. 390.

Maryland—*Solvuca v. Ryan and Reilly Co.*, — Md. App. —, 101 Atl. 710.

Massachusetts—*Opinions of Justices*, 209 Mass. 607, 96 N. E. 308; *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1. *Duart v. Simmons* 231 Mass. 313, 121 N. E. 10, 3 W. C. L. J. 136.

Michigan—*Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153, N. W. 49; *Wood v. City of Detroit*, 155 N. W. 592, L. R. A. 1916 C. 388.

Minnesota—*Matheson v. Minneapolis Street Ry.*, 126 Minn. 286, 148 N. W. 71.

Montana—*Lewis & Clark County v. Industrial Board*, 155 Pac. 208; *Shea v. North Butte Mining Co.*, 3 W. C. L. J. 768, 179 Pac. 499.

New Hampshire—*Wheeler v. Contootuck Mills*, 94 Atl. 265, 77 N. H. 551.

New Jersey—*Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 3 N. C. C. A. 569, 86 Atl. 451, 86 N. J. L. 701, 91 Atl. 1070; *Huyett v. Penna. Ry. Co.*, 86 N. J. L. 683, 92 Atl. 58; *Troth v. Millville Bottle Works*, 86 N. J. L. 558, 91 Atl. 1031.

though in some states minor provisions of the acts have been held unconstitutional.⁶

6. *Courter v. Simpson Construction Co.*, 246 Ill. 488; 106 N. E. 350. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; 9 N. C.

4 Continued.

New York—*Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916 A, 493 Ann. Cas. 1916 B, 279, 9 N. C. C. A. 286; *Sperduto v. New York City Int. Ry. Co. (N. Y.)* 2 W. C. L. J. 503, 226 N. Y. 73, 123 N. E. 207.

North Dakota—*State ex rel. Amerland v. Hagan*, — N. Dak. —, 175 N. W. 372, 5 W. C. L. J. 446.

Ohio—*Ex rel. Yapple v. Creamer*, 85 Ohio St. 349; 97 N. E. 602, 1 N. C. C. A. 30; *Jeffrey Mfg. Co. v. Blagg*, 90 Ohio 376, 108 N. E. 465, Affirmed, 235 U. S. 571, 59 L. Ed. 364, 35 Sup. Ct. 167, 7 N. C. C. A. 570.

Oklahoma—*Adams v. Iten Biscuit Co.*, 162 Pac. 938.

Oregon—*Evanhoff v. State Ind. Commission*, 154 Pac. 106, 78 Ore. 503.

Pennsylvania—*Anderson v. Carnegie Steel Co.*, 99 Atl. 215, 255 Pa. 33.

Rhode Island—*Sayles v. Foley*, 96 Atl. 340, 38 R. I. 484.

Texas—*Middleton v. Texas Power & Light Co.*, 178 S. W. 956, 185 S. W. 556; *Marshall Mill & Elevator Co. v. Schanberg (Tex. Civ. App.)* 190 S. W. 229.

Utah—*Garfield Smelting Co. v. Ind. Com. of Utah*, 3 W. C. L. J. 531, 178 Pac. 57; *Reteuna v. Indus. Comm.*, — Utah —, 185 Pac. 535, 5 W. C. L. J. 327.

Washington—*State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, 3 N. C. C. A. 599; *State v. City of Seattle*, 73 Wash. 390, 132 Pac. 45; *Stertz v. Industrial Commission*, 158 Pac. 256; *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, 5 N. C. C. A. 811.

West Virginia—*De Francesco v. Piney Mining Co.*, 76 W. Va. 756, 86 S. E. 777, 10 N. C. C. A. 1015, *Rhodes v. J. B. B. Coal Co.*, 90 S. E. 796, 79 W. Va. 71, 78 W. Va. 144, *Watts v. Ohio Valley Electric Co.*, 88 S. E. 659.

Wisconsin—*Borgnis v. Falk*, 147 Wis. 327, 133 N. W. 209, 3 N. C. C. A. 649, 37 L. R. A. (N. S.) 489.

The following states have adopted amendments to their constitutions to permit of compulsory laws, i. e.: California (1911), Ohio (1912), New York (1913), Pennsylvania (1915), and in California an amendment further enlarging the power of the Legislature is pending. Under the Constitution of Arizona and Wyoming definite forms of compensation laws are prescribed.

In the following twelve States the law, though elective as to private employers, is compulsory as to such public employments as are covered: Colorado, Indiana, Iowa, Louisiana, Maine, Michigan, Missouri, Montana, Nevada, New Jersey, Pennsylvania, South Dakota, and Wisconsin.

In the following eleven States and one Territory the law is compulsory as to some or all classes of private employers affected: Arizona, California, Idaho, Illinois, Maryland, New York, Ohio, Oklahoma, Utah, Washington, Wyoming and Hawaii. All of these laws except that of Arizona are equally compulsory as to employees. North Dakota is compulsory as to all employers and employees. The Porto Rico Act which is compulsory upon employees was held to be compulsory as to employers also. *Camunas v. N. Y. & P. R. S. S. Co.*, 171 C. C. A. 76.

In the following thirty-one states and two Territories the law is elective as to all private employments covered: Alabama, Colorado, Connecticut, Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, West Virginia, Virginia, Wisconsin, Alaska, and Porto Rico. And New York, besides a compulsory act, has also a little used elective act of wider scope. (Art. 14 of ch. 36 Laws 1909, as amended.) Under all these acts except that of West Virginia, the liability for compensation is elective as to both employers and employees. Under the act of that State employers only have the right of election. Under the New Hampshire act (which is elective as to employers) employees have the right of election after injury, this was formerly also true of the Arizona Act.

The following quotation from the opinion of the Supreme Court of the United States in the case of *New York Central Railroad Co. v. White*, 243 U. S. 188, 61 L. Ed. 667, 13 N. C. C. A. 943, while lengthy, is so pertinent and valuable on the question of the Constitutionality of Compensation Acts generally that the author feels justified in inserting it. "In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544 (58 L. Ed. 713); *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 167, 576 (59 L. Ed.

C. A. 466; *Perry v. Industrial Accident Commission of California et al.* (Cal.) 181 Pac. 788, 4 W. C. L. J. 350 (1919); *Dominguez v. Pendola*, — Cal. App. —, (1920), 188 Pac. 1025, 6 W. C. L. J. 3.

364, 7 N. C. C. A. 570) yet, as pointed out by the court of appeals in the Jensen Case (215 N. Y. 526) 1916 A, L. R. A. 403, 109 N. E. 600, the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer. The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is of course recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. *Munn v. Illinois*, 94 U. S. 113, 134 (24 L. Ed. 77); *Hurtado v. California*, 110 U. S. 516, 532 (28 L. Ed. 232); *Martin v. Pittsburg & Lake Erie R. R.*, 203 U. S. 284, 294 (51 L. Ed. 184, 8 Ann. Cas. 87); *Second Employers' Liability Cases*, 223 U. S. 1, 50 (56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44); *Chicago & Alton R. R. v. Tranbarger*, 238 U. S. 67, 76 (59 L. Ed. 1204). The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U. S. 281, 295 (52 L. Ed. 1061, 21 Am. Neg. Rep. 464; *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 39, 43 (60 L. Ed. 874).

"The fault may be that of the employer himself, or—most frequently—that of another for whose conduct he is made responsible according to the maxim *respondeat superior*. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the *alter ego* while acting within the scope of his duties be negligent—in disobedience, it may be, of the employer's positive and specific command—the employer is answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation."

“The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman’s negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are *Murray v. Railroad Company* (1841), 1 McMull. (S. C.) 385, 398 (17 Am. Neg. Cas. 308); *Farwell v. Boston & Worcester R. R. Corp.* (1842), 4 Metc. 49, 57 (15 Am. Neg. Cas. 407); *Hutchison v. York, Newcastle & Berwick Ry. Co.* (1850), 5 Exch. 343, 351, 19 L. J. Exch. 296, 299, 14 Jr. 837, 840; *Bartonsville Coal Co. v. Reid* (1858), 3 Macq. H. L. Cas. 266, 284, 295. And see *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 483 (27 L. Ed. 1003); *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 647 (29 L. Ed. 755). The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow-servant and who a vice principal or *alter ego* of the master, turning sometimes upon refined distinctions as to grades and departments in the employment. See *Knutter v. N. Y. & N. J. Telephone Co.*, 67 N. J. Law 646, 650-653, 52 Atl. 565 (12 Am. Neg. Rep. 109, 58 L. R. A. 808). It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

“The same may be said with respect to the general doctrine of assumption of risk. By the common law the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer’s negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them, in either of which cases he does assume them, if he continue in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employee does not in ordinary cases assume the special risk. *Seaboard Air Line v. Horton*, 233 U. S. 492, 504 (58 L. Ed. 1062,

8 N. C. C. A. 834, Ann. Cas. 1915 B 475); 239 U. S. 595, 599 (60 L. Ed. 458). Plainly, these rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the state.

"So, also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject, in their bearing upon the employer's responsibility, are subject to legislative change; for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

"It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act, both within and without the relation of employer and employee, is a modern statutory innovation, in which the states differ as to who may sue, for whose benefit, and the measure of damages.

"But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the states to establish by legislation departures from the follow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee. *Missouri Ry. Co. v. Mackey*, 127 U. S. 205, 208 (32 L. Ed. 107); *Minneapolis & C. Railway Co. v. Herrick*, 127 U. S. 210 (32 L. Ed. 109); *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 598 (50 L. Ed. 322); *Tullis v. Lake Erie & Western R. R.*, 175 U. S. 348 (44 L. Ed. 192, 21 Am. Neg. Rep. 401n); *Louisville & Nashville R. R. v. Melton*, 218 U. S. 36, 53 (54 L. Ed. 921, 47 L. R. A. (N. S.) 84); *Chicago, Ind. & L. Ry. Co. v. Hackett*, 228 U. S. 559 (57 L. Ed. 966); *Wilmington Mining Co. v. Fulton*, 205 U. S. 60, 73 (51 L. Ed. 708); *Missouri Pacific Ry. Co. v. Castle*, 224 U. S. 541, 544 (56 L. Ed. 875). A corresponding power on the part of congress, when legislating within its appropriate sphere, was sustained in *Second Employers' Liability Cases*, 223 U. S. 1 (56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44). And see *El Paso & N. E. Ry. v. Gutierrez*, 215 U. S. 87, 97 (54 L. Ed. 106); *Balt. & Ohio R. R. v. Int. Com. Comm.*, 221 U. S. 612, 619 (55 L. Ed. 878).

"It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate.

Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the State of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer on the one hand having embarked his capital and each employee on the other having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing relation, it perhaps may be doubted whether the state could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is tendered as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting

the subject-matter are not placed by the Fourteenth Amendment beyond the reach of the law-making power of the state; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

"We will consider, first, the scheme of compensation, deferring for the present the question of the manner in which the employer is required to secure payment.

"Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and measures the death benefits according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

"Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and ordinarily nothing more; the employer is to furnish plant, facilities, organization, capital, credits, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and of necessity bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life

through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power; a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale.

“Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the car-

rier, of the innkeeper, of him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. *St. Louis & San Francisco Ry. v. Mathews*, 165 U. S. 1, 22 (41 L. Ed. 611); *Chicago, R. I. etc., Ry. Co. v. Zerneck*, 183 U. S. 582, 586 (46 L. Ed. 339).

“We have referred to the maxim *respondeat superior*. In a well-known English case, *Hall v. Smith*, 2 Bing. 156, 160, this maxim was said by Best, C. J., to be bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it. And this view has been adopted in *New York. Cardot v. Barney*, 63 N. Y. 281, 287 (20 Am. Rep. 533). The provision for compulsory compensation, in the act under consideration, cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that in modern industry the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing

the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

“This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous in the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

“But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: ‘Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.’ *Coppage v. Kansas*, 236 U. S. 1, 14 (59 L. Ed. 441, L. R. A. 1915 C. 960). And this is the other: ‘It requires no argument to show that the right to work for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure.’ *Truax v. Raich*, 239 U. S. 33, 41 (60 L. Ed. 131).

“It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable upon that ground. And for this reason: The subject-matter in respect of which freedom of contract

is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. 'The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.' *Holden v. Hardy*, 169 U. S. 366, 397 (42 L. Ed. 780). It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be 'natural and inalienable;' and the authority to prohibit contracts made in derogation of a lawfully-established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear. *Chicago, B. & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 571 (55 L. Ed. 328), *Second Employers' Liability Cases*, 223 U. S. 1, 52 (56 L. Ed. 327), 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44.

"We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery, tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. *Sherlock v. Al-ling*, 93 U. S. 99, 103 (23 L. Ed. 819); *Missouri Pacific Ry. Co. v. Castle*, 224 U. S. 541, 545 (56 L. Ed. 875).

"No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity

to be heard required by the Fourteenth Amendment. The denial of a trial by jury is not inconsistent with 'due process.' *Walker v. Sauvinet*, 92 U. S. 90 (23 L. Ed. 678); *Frank v. Mangum*, 237 U. S. 309, 340 (59 L. Ed. 569).

"The objection under the 'equal protection' clause is not pressed. The only apparent basis for it is in the exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this cannot be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. *Missouri, Kansas & Texas Ry. v. Cade*, 233 U. S. 642, 650 (58 L. Ed. 1135), and cases there cited.

"We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By section 50, this may be done in one of three ways: (a) state insurance, (b) insurance with an authorized insurance corporation or association, or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the commission, deposited securities to the amount of \$300,000, under section 50, and \$30,000 in cash as a deposit to secure prompt and convenient payment, under section 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

"The system of compulsory compensation having been found to be within the power of the state, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of section 50 has not been, and presumably will not be, construed so as to give an unbridled discretion to the commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms

imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its payroll (about \$50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested.

"This being so, it is obvious that this case presents no question as to whether the state might, consistently with the Fourteenth Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the state to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests."

In discussing the constitutionality of the Iowa Act the Supreme Court of the United States, in the case of *Hawkins v. Bleakley* said: "Some of appellant's objections are based upon the ground that the employer is subjected to a species of duress in order to compell him to accept the compensation features of the act, since it is provided that an employer rejecting these features shall not escape liability for personal injury sustained by an employee arising out of and in the usual course of the employment because the employee assumed the risks of the employment, or because of the employee's negligence unless this was wilful and with intent to cause the injury or was the result of intoxication, or because the injury was caused by the negligence of a co-employee. But it is clear, as we have pointed out in *New York Central R. R. Co. v. White*, No. 230, decided this day (243 U. S. 188, 61 L. Ed. 667, 13 N. C. C. A. 943), that the employer has no vested right to have these so-called common-law defenses perpetuated for his benefit, and that the Fourteenth Amendment does not prevent a state from establishing a system of

workmen's compensation without the consent of the employer, incidentally abolishing the defenses referred to.

"The same may be said as to the provision that in an action against an employer who has rejected the act it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut the presumption of negligence. In addition, we may repeat that the establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law. *Mobile, etc. R. R. v. Turnipseed*, 219 U. S. 35, 42 (55 L. Ed. 78, 2 N. C. C. A. 243, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463).

"Objection is made to the provision in section 3, that where an employee elects to reject the act he shall state in an affidavit who, if anybody, requested or suggested that he should do so, and if it be found that the employer or his agent made such a request or suggestion, the employee shall be conclusively presumed to have been unduly influenced, and his rejection of the act shall be void. Passing the point that appellant is an employer and will not be heard to raise constitutional objections that are good only from the standpoint of employees (*Hatch v. Reardon*, 204 U. S. 152, 160 (51 L. Ed. 415, 9 Ann. Cas. 736); *Rosenthal v. New York*, 226 U. S. 260, 271 (57 L. Ed. 212, Ann. Cas. 1914B 71); *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544 (58 L. Ed. 713); *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576 (58 L. Ed. 713, 7 N. C. C. A. 570); *Hendrick v. Maryland*, 235 U. S. 610, 621 (59 L. Ed. 385), it is sufficient to say that the criticised provision evidently is intended to safeguard the employee from all influences that might be exerted by the employer to bring about his dissent from the compensation features of the act. The lawmaker no doubt entertained the view that the act was more beneficial to employees than the common-law rules of employer's liability, and that it was highly improbable an employee would reject the new arrangement of his own free will. The provision is a permissible regulation in aid of the general scheme of the act.

"It is said that there is a denial of due process in that part of the act which provides for the adjustment of the compensation where the employer accepts its provisions. In case of disagreement between an employer and an injured employee, either party may notify the Industrial Commissioner, who thereupon shall call for the formation of an arbitration committee consisting of three persons, with himself as chairman. The committee is to make such inquiries and investigations as it shall deem necessary, and its report is to be filed with the Industrial Commissioner. If a claim for review is filed, the commissioner, and not the committee, is to hear the parties, may hear evidence in regard to pertinent matters, and may revise the decision of the committee in whole or in part, or refer the matter back to the committee for further findings of fact. And any party in interest may present the order or decision of the commissioner, or the decision of an arbitration committee from which no claim for review has been filed, to the district court of the county in which the injury occurred, whereupon the court shall render a decree in accordance therewith, having the same effect as if it were rendered in a suit heard and determined by the court, except that there shall be no appeal upon questions of fact or where the decree is based upon an order or decision of the commissioner which has not been presented to the court within 10 days after the notice of the filing thereof by the commissioner. With respect to these provisions, the Supreme Court of Iowa held (154 N. W. 1064): 'Appeal is provided from the decree enforcing the award on which all save pure questions of fact may be reviewed. * * * We hold that though the act does not in terms provide for judicial review, except by said appeal, the statute does not take from the court all jurisdiction in the premises. * * * We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded—could inquire whether the act was being enforced against one who has rejected it, whether the claiming employee was an employee, whether he was injured at all, whether his injury was one arising out of

such employment, whether it was due to intoxication of the servant, or self-inflicted, or, acceptance being conceded, into whether an award different from the statute schedules has been made, into whether the award were (was) tainted with fraud on part of the prevailing party, or of the arbitration committee, and into whether that body attempted judicial functions, in violation of or not granted by the act.' Thus it will be seen that the act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular case; provides for a hearing before an administrative tribunal, and for judicial review upon all fundamental and jurisdictional questions. This disposes of the contention that the administrative body is clothed with an arbitrary and unbridled discretion, inconsistent with a proper conception of due process of law. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 545 (58 L. Ed. 713).

"Objection is made that the act dispenses with trial by jury. But it is settled that this is not embraced in the rights secured by the Fourteenth Amendment. *Walker v. Sauvinet*, 92 U. S. 90 (23 L. Ed. 678); *Frank v. Mangum*, 237 U. S. 309, 340 (59 L. Ed. 569); *New York Central R. R. Co. v. White* (243 U. S. 188, 61 L. Ed. 667, 13 N. C. C. A. 943).

"It is elaborately argued that, aside from the Fourteenth Amendment, the inhabitants of the State of Iowa are entitled to this right, because it was guaranteed by the Ordinance of July 13, 1787, for the government of the Northwest Territory (1 Stat. 51), in these terms: 'The inhabitants of the said territory shall always be entitled to the benefits of * * * the trial by jury.' The argument is rested, first, upon the ground that Iowa was a part of the Northwest Territory. This is manifestly untenable, since that territory was bounded on the west by the Mississippi River, and Iowa was not part of it, but of the Louisiana Purchase. But, secondly, it is contended that the guaranties contained in the Ordinance were extended to Iowa by the Act of Congress approved June 12, 1838, establishing a territorial government (ch. 96, sec. 12; 5 Stat. 235, 239), and by the acts for the admission of the state into the Union. (Acts of March 3,

1845, ch. 48 and 76; 5 Stat. 742, 789; Act of August 4, 1846, ch. 82; 9 Stat. 52; Act of December 28, 1846, ch. 1; 9 Stat. 117; 1 Poor, Chart. & Const., 331, 534, 535, 551.) This is easily disposed of. The Act of 1838 was no more than a regulation like any such regulation; and the act for admitting the state, so far from perpetuating any particular institution previously established, admitted it 'on an equal footing with the original states in all respects whatsoever.' The regulation, although embracing provisions of the ordinance declared to be unalterable unless by common consent, had no further force in Iowa after its admission as a state and the adoption of a State Constitution, than other acts of congress for the government of the territory. All were superseded by the State Constitution. *Pernoli v. First Municipality*, 3 How. 589, 610 (11 L. Ed. 739); *Coyle v. Oklahoma*, 221 U. S. 559, 567, 570 (55 L. Ed. 853); *Cincinnati v. Louis. & Nash. R. R. Co.*, 223 U. S. 390, 401 (56 L. Ed. 481). The State of Iowa, therefore, is as much at liberty as any other state to abolish or limit the right of trial by jury; or to provide for a waiver of that right, as it has done by the act under consideration.

"Section 5 is singled out for criticism as denying to employers the equal protection of the laws. It reads: 'Where the employer and employee elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employee had not rejected the terms, conditions and provisions thereof.' As we have shown, if the employer rejects the act he remains liable for personal injury sustained by an employee, arising out of and in the usual course of the employment, and is not to escape by showing that he had exercised reasonable care in selecting competent employees in the business, or that the employee had assumed the risk, or that the injury was caused by the negligence of a co-employee, or even by showing that the plaintiff was negligent, unless such negligence was willful and with intent to cause the injury or was the result of intoxication on the part of the injured party. This is the result whether the employee on his part accepts or rejects the act. But where the employee rejects it and the employer accepts it, then, by section 3b, 'the employer shall have

the right to plead and rely upon any and all defenses including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow-servant shall apply and be available to the employer as by statute authorized unless otherwise provided in this act,' with a proviso not material to the present point. We cannot say that there is here an arbitrary classification within the inhibition of the 'equal protection' clause of the Fourteenth Amendment. All employers are treated alike, and so are all employees; and if there be some difference as between employer and employee respecting the inducements that are held out for accepting the compensation features of the act, it goes no further than to say that if neither party is willing to accept them the employer's liability shall not be subject to either of the several defenses referred to. As already shown, the abolition of such defenses is within the power of the state, and the legislation cannot be condemned when that power has been qualifiedly exercised, without unreasonable discrimination.'''

In sustaining the constitutionality of the Washington Act which is compulsory and provides also a monopolistic and compulsory state insurance plan, the Supreme court of the United States said: "The only serious question is that which is raised under the 'due process of law' and 'equal protection' clauses of the Fourteenth Amendment. It is contended that since the act unconditionally requires employers in the enumerated occupations to make payments to a fund for the benefit of employees, without regard to any wrongful act of the employer, he is deprived of his property, and of his liberty to acquire property, without compensation and without due process of law. It is pointed out that the occupations covered include many that are private in their character, as well as others that are subject to regulation as public employments, and it is argued that with respect to private occupations (including those of plaintiff in error) a compulsory compensation act does not concern the interests of the public generally, but only the particular interests

7. *Hawkins v. Bleakley*, 243 U. S. 210, 61 L. Ed. 678, 37 Supp. Ct. Rep. 255, 13 N. C. C. A. 959.

of the employees, and is unduly oppressive upon employers and arbitrarily interferes with and restricts the management of private business operations.

"The statute, although approved March 14, 1911, took effect as between employers and workmen on October 1st in that year, actions pending and causes of action existing on September 30th being expressly saved. It therefore disturbed no vested rights, its effect being confined to regulating the relation of employer and employee in the hazardous occupations *in futuro*. * * *

"Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulations and taxation, the crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of its validity, and the burden of proof and argument is upon those who seek to overthrow it. *Erie R. R. Co. v. Williams*, 233 U. S. 685, 699 (58 L. Ed. 1155). In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation.

"As to the first point: The authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people, carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. *Lawton v. Steele*, 152 U. S. 133, 136 (38 L. Ed. 385). 'The police power of a state is as broad and plenary as its taxing power,' *Kidd v. Pearson*, 128

U. S. 1, 26 (32 L. Ed. 346). In *Barbier v. Connolly*, 113 U. S. 27, 31 (28 L. Ed. 923), the court, by Mr. Justice Field said: 'Neither the (Fourteenth) Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' It seems to us that the considerations to which we have adverted in *New York Central R. R. Co. v. White*, *supra*, as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies. Certainly the operation of industrial establishments that in the ordinary

course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern. It hardly would be questioned that the state might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation or as tending to encourage the performance of the public duty of defense. But is the state powerless to compensate, with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the state? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case, the Supreme Court of Washington said: 'Under our statutes the workman is the soldier of organized industry accepting a kind of pension in exchange for absolute insurance on his master's premises.' *Stertz v. Industrial Insurance Commission*, 158 Pac. 256, 263. It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the state powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the state are not thus circumscribed by the Fourteenth Amendment.

"Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this

point no particular contention is made that the compensation allowed is unduly large; and it is evident that unless it be so the corresponding burden upon the industry cannot be regarded as excessive if the state is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we have said in *New York Central R. R. Co. v. White*, *supra* (ante), that in sustaining the law we do not intend to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable, and that any question of that kind may be met when it arises.

“Upon the third question—the distribution of the burden—there is no criticism upon the act in its details. As we have seen, its fourth section prescribes the schedule of contribution, dividing the various occupations into groups, and imposing various percentages evidently intended to be proportioned to the hazard of the occupations in the respective groups. Certainly the application of a proper percentage to the pay roll of the industry cannot be deemed an arbitrary adjustment, in view of the legislative declaration that it is ‘deemed the most accurate method of equitable distribution of burden in proportion to relative hazard.’ It is a matter of common knowledge that in the practice of insurers the pay roll frequently is adopted as the basis for computing the premium. The percentages seem to be high; but when these are taken in connection with the provisions requiring accounts to be kept with each industry in accordance with the classification, and declaring that no class shall be liable for the depletion of the accident fund from accidents happening in any other class, and that any class having sufficient funds to its credit at the end of the first three months or any month thereafter is not to be called upon, it is plain that, after the initial payment, which may be regarded as a temporary reserve, the assessments will be limited to the amounts necessary to meet actual losses. As further rebutting the suggestion that the imposition is exorbitant or arbitrary, we should accept the declaration of intent that the fund shall ultimately become neither more or less than self-supporting, and that the rates are subject

to future adjustment by the legislature and the classifications to rearrangement according to experience, as plain evidence of an intelligent effort to limit the burden to the requirements of each industry.

“We may conveniently answer at this point the objection that the act goes too far in classifying as hazardous large numbers of occupations that are not in their nature hazardous. It might be sufficient to say that this is no concern of plaintiff in error, since it is not contended that its business of logging timber, operating a logging railroad, and operating a sawmill with power-driven machinery, or either of them, are non-hazardous. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544 (58 L. Ed. 713). But further, the question whether any of the industries enumerated in section 4 is non-hazardous will be proved by experience, and the provisions of the act themselves give sufficient assurance that if in any industry there be no accident there will be no assessment, unless for expenses of administration. It is true that, while the section as originally enacted provided for advancing the classification of risks and premium rates in a particular establishment shown by experience to be unduly dangerous because of poor or careless management, there was no corresponding provision for reducing a particular industry shown by experience to be included in a class which imposed upon it too high a rate. This was remedied by the amendment of 1915, quoted in the margin, above, which, however, cannot affect the decision of the present case. But in the absence of any particular showing of erroneous classification—and there is none—the evident purpose of the original act to classify the various occupations according to the respective hazard of each is sufficient answer to any contention of improper distribution of the burden amongst the industries themselves.

“There remains, therefore, only the contention that it is inconsistent with the due process and equal protection clauses of the Fourteenth Amendment to impose the entire cost of accident loss upon the industries in which the losses arise. But if, as the Legislature of Washington has declared in the first section of the act, injuries in such employments have become fre-

quent and inevitable, and if, as we have held in *New York Central R. R. Co. v. White*, supra, the state is at liberty, notwithstanding the Fourteenth Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the state from imposing the entire burden upon the industries that occasion the losses. The act in affect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay roll, the repair account, or any other item of cost. The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.

“We are clearly of the opinion that a state, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among the men and women employed, and, occasionally loss of life of those who have wives and children or relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York Central R. R. Co. v. White*, supra, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that if charged to the industry it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the state is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

“To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry they will occur, we deem that the state acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the state, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation. * * * Perhaps a word should be said respecting a clause in section 4 which reads as follows: ‘It shall be lawful for the employer to deduct or obtain (sic) any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deductions shall be a gross misdemeanor.’ If this were to be construed so broadly as to prohibit employers and employees, in agreeing upon wages and other terms of employment, from taking into consideration the fact that the employer was a contributor to the state fund, and the resulting effect of the act upon the rights of the parties, it would be open to serious question whether as thus construed it did not interfere to an unconstitutional extent with their freedom of contract. So far as we are aware the clause has not been so construed, and on familiar principles we will not assume in advance that a construction will be adopted such as to bring the law into conflict with the Federal Consti-

tution. *Bachtel v. Wilson*, 204 U. S. 36, (51 L. Ed. 357); *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546 (58 L. Ed. 715).''⁸

§ 5. **Constitutionality of Miscellaneous Provisions.**—The subrogation of the employer to the rights of the injured employee against the negligent third person is not unconstitutional.⁹

The provision of the New York Act allowing compensation for facial disfigurement to an amount not to exceed \$3,500.00 does not deprive employers, ordered to pay such an award, of their property without due process of law in contravention of the Fourteenth Amendment, the provision not being unreasonable, arbitrary, or contrary to fundamental right while the allowance prescribed does not exceed the constitutional limitations on state power.¹⁰

The provision of the Colorado Act providing for the assessment of premiums against public employers to provide a fund for the benefit of injured employees is constitutional, being a proper exercise of the police power of the state in caring for public needs.¹¹

In discussing the constitutionality of the North Dakota Act the Supreme Court said: "It is within the province of the Legislature, in the proper exercise of its police power, as a matter of public policy, to declare that there is an element of hazard or of danger in employment in the modern business world, and this court, upon construction of its definition in that regard, will not presume that the term 'hazardous' must necessarily refer

8. *Mountain Timber Co. v. State of Washington*, 243 U. S. 219, 61 L. Ed. 685, 13 N. C. C. A. 927, 37 Sup. Ct. 260.

9. *Friebel v. Chicago City Ry. Co. et al.*, 280 Ill. 76, 117 N. E. 467, 16 N. C. C. A. 390; *Western States Gas and Electric Co. v. Bayside Lbr. Co.*, — Cal. —, 187 Pac. 735, 5 W. C. L. J. 649 (1920).

10. *New York Cent. R. Co. v. Blanc*, — U. S. —, 40 Sup. Ct. Rep. 44, 5 W. C. L. J. 3; *Sweeting v. American Knife Co.*, 226 N. Y. 199, 123 N. E. 82, 4 W. C. L. J. 125, 5 W. C. L. J. 3.

11. *School Dist. No. 1 v. Indus. Comm. of Colo.*, — Colo. —, 185 Pac. 348, 5 W. C. L. J. 163.

to employments that have heretofore been termed hazardous, by reason of extra features of hazard inherent to the nature of occupation. The Legislature, within the exercise of its police powers, in enacting a compulsory Compensation Act, may abrogate common-law defenses, and impose liability without fault, substituting new rules of legal procedure in place of the old, so long as its action in that regard is not arbitrary, unjust, or unreasonable.¹²

Limiting the application of the Arizona Act to the injured employee engaged in manual and mechanical labor is a proper exercise of the legislative power under the Arizona Constitution.¹³

Making rights and remedies under the Louisiana Act exclusive, does not undertake to fix the price of manual labor contrary to the state constitution.¹⁴

The provision of the New York Act extending its benefits to maritime work is not in violation of the Federal Constitution.¹⁵ The California Supreme Court came to a contrary conclusion,¹⁶

12. *State ex rel. Amerland v. Hagan*, — N. Dak. —, 175 N. W. 372, 5 W. C. L. J. 446; *Matthiessen & Hegler Zinc Co. v. Indus. Bd.*, — Ill. —, 120 N. E. 249, 2 W. C. L. J. 875; *Superior & Pittsburg Copper Co. v. Davidovich*, 19 Ariz. 402, 171 Pac. 127, 1 W. C. L. J. 727, 16 N. C. C. A. 801; *Sayles v. Foley*, 38 R. I. 489, 96 Atl. 340, 12 N. C. C. A. 949; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1; *State Indus. Comm. v. Voorhees*, — App. Div. —, 184 N. Y. S. 888, 7 W. C. L. J. 238; *Page v. New York Realty Co.*, — Mont. —, 1921, 196 Pac. 871.

13. *Arizona Eastern R. Co. v. Mathews*, 20 Ariz. 282, 180 Pac. 159, 4 W. C. L. J. 3; *Marshall Field & Co. v. Indus. Comm. of Ill.*, 285 Ill. 333, 120 N. E. 773, 3 W. C. L. J. 105; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1.

14. *Day v. Louisiana Central Lumber Co.*, — La. —, 81 So. 328, 4 W. C. L. J. 89.

15. *Stewart v. Knickerbocker Ice Co.*, — N. Y. App. —, 123 N. E. 382; *Ruddy v. Morse Dry Dock & Repair Co.*, 176 N. Y. Supp. 731, 4 W. C. L. J. 448.

16. *Sudden & Christenson v. Indus. Comm.*, — Cal. —, 188 Pac. 803, 5 W. C. L. J. 768.

and subsequently the United States Supreme Court reversed the New York Court.¹⁷

It is within the power of the Legislature under Article 1, Section 19, of the New York Constitution to provide in the Workmen's Compensation Law, Section 11, that liability in death cases shall be exclusive, except in certain cases.¹⁸

The Supreme Court of Ohio has held that the act of March 20, 1917 (107 Ohio Laws, pp. 157, 159), amending section 1465—69 Page & A. Gen. Code, is a valid and constitutional exercise of the authority conferred upon the General Assembly of Ohio by section 35 of Article 2 of the Constitution of Ohio and applies to all employers of labor mentioned in section 1465—60 of its General Code, holding the question involved to be in every way analogous to the one arising in the case of *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671, in which it was held by the Supreme Court of the United States that, "The power of Congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters by individuals; but contracts of that nature are made subject to the possibility that, even if valid when made, Congress may by exercising its power render them invalid."¹⁹

The Supreme Court of Washington in passing on the constitutionality of section 19 of its act, Laws of 1917 p. 96 said:

"The respondent, in support of his argument that section 19 is class legislation, insists that the right to institute an action for personal injuries is given to persons engaged 'in maintenance and operation of railways doing interstate, foreign and intrastate commerce, and in maintenance and construction of their equipment,' and provides that such railroads shall, in

17. *Knickerbocker Ice Co. v. Stewart*, — U. S. —, 40 Sup. Ct. R. 438, 6 W. C. L. J. 119.

18. *Basso et al. v. John Clerk & Son, Inc.*, 177 N. Y. Supp. 484, 4 W. C. L. J. 530.

19. *Thornton v. Duffy*, 99 Ohio St. 120, 124 N. E. 54, 4 W. C. L. J. 548; *Porter v. Hopkins*, 91 Ohio 74, 109 N. E. 629, 9 N. C. C. A. 839; *Utah Fuel Co. v. Indus. Comm.*, — Utah —, (1920), 194 Pac. 122, 7 W. C. L. J. 370.

actions against them, have available only such defenses as are available to interstate railroads or railroads engaged in interstate business under the Federal Employer's Act, and that constitutes a discrimination between the rights possessed by employees of railroads such as logging, interurban, street, etc., for the reason that workmen engaged upon railroads doing purely an intrastate business are subject to the same hazards as those workmen, engaged in similar occupations upon railroads within the act. In other words, that an arbitrary classification exists, while there is no substantial distinction between the classes of workmen. "The equal protection of the laws means the protection of equal laws, but this equality of protection is not violated by classification, provided equal protection is afforded the members of each class. The power of the state to classify the objects of legislation is very broad. It is a matter of legislative discretion, and such classification will be upheld if it bears a reasonable relation to a proper object sought to be accomplished, even if it may appear unwise or unjust. The courts will not interfere with such classification unless the distinctions made are clearly arbitrary." Taylor, *Due Process of Law*, p. 725, Sec. 458." It was held that this section did not deny equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution, in that it discriminated against employees of purely intrastate carriers.²⁰

Where it was contended that parts of the act were unconstitutional because not sufficiently embraced in the title as required by the state constitution which provides: "No bill shall embrace more than one subject and that shall be expressed in the title," the court said: "As the Constitution has not indicated the degree of particularity necessary to express in its title the subject of an act, the courts should not embarrass legislation by technical interpretations based upon mere form of phraseology.

20. Archibald v. Northern Pac. R. Co. et al., 108 Wash. 97, 183 Pac. 95, 4 W. C. L. J. 663; Greene v. Caldwell, 170 Ky. 571, 186 S. W. 648, 12 N. C. C. A. 520; Sayles v. Foley, 38 R. I. 484, 96 Atl. 340, 12 N. C. C. A. 949; Wangler Boiler and Sheet Metal Co. v. Indus. Comm., — Ill. —, 122 N. E. 366, 3 W. C. L. J. 617.

The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that the double subject was not fully expressed in the title. *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077. No elaborate statement of the subject of an act is necessary to meet the spirit of the Constitution. A few well-chosen words, suggestive of the general subject treated, is all that is required. *State ex. rel. Seattle El. Co. v. Superior Ct.*, 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831.²¹

"The statute provides for attorney's fees where the employer does not institute proceedings for a review and refuses to pay compensation. *McMurray v. Peabody Coal Co.*, 281 Ill. 218, 118 N. E. 29. There is no constitutional objections to such a statute and the facts authorized the allowance. The purpose of the statute is to provide a speedy method for the adjustment of compensation and the payment of the same, without the delays of litigation and the burden of expense and attorney's fees otherwise imposed upon claimants."²²

The question of discrimination under compensation acts can not be raised by one who does not claim to be affected by the alleged discrimination. "The sole ground of attack is that section 75a involves an unjustifiable discrimination against employees who are not residents of this state, and thus violates the provision of the Constitution of the United States declaring that the citizens of each state shall be entitled to the privileges and immunities of citizens in the several states' (Art. 4, Sec. 2), and that prohibiting any state from denying 'to any person within

21. *Archibald v. Northern Pac. R. Co. et al.*, 108 Wash. 97, 183 Pac. 95, 4 W. C. L. J. 663; *Fidelity & Casualty Co. of N. Y. v. Llewellyn Iron Works*, — Cal. App. —, 184 Pac. 402, 4 W. C. L. J. 694; *Boyer v. Crescent Paper Box Factory*, 143 La. 368, 78 So. 596, 17 N. C. C. A. 473, 2 W. C. L. J. 71; *Young v. Sterling Leather Works*, 91 N. J. L. 289, 102 Atl. 395, 1 W. C. L. J. 653; *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S. W. 556, 11 N. C. C. A. 873; *Whittington v. La. Sawmill Co.* — La. —, 76 So. 754, A 1 W. C. L. J. 719.

22. *Friedman Mfg. Co. v. Industrial Comm. of Ill.*, 284 Ill. 554, 120 N. E. 460, 3 W. C. L. J. 21.

its jurisdiction the equal protection of the laws' (Amendment 14, Sec. 1). Under settled principles of constitutional law the petitioners are not in a position to raise this question. Generally speaking, the courts will not consider the constitutionality of a statute attacked by one whose rights are not affected by the operations of the statute. 12 C. J. 760; *Scheerer v. Deming*, 154 Cal. 133, 142, 97 Pac. 155. More specifically a contention that a statute denies equal rights and privileges by discriminating between persons or classes of persons 'may not be raised by one not belonging to the class alleged to be discriminated against.' 12 C. J. 768, 10 Cent. Dig. Col. 1284 et seq; *Estate of Johnson*, 139 Cal. 532, 534, 73 Pac. 424, 96 Am. St. Rep. 161. Thus the validity of a statute excluding colored persons from serving on juries cannot be questioned by whites. *Commonwealth v. Wright*, 79 Ky. 22, 42 Am. Rep. 203. Nor may a male question the validity of a statute as discriminating against women. *McKinney v. State*, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710. On like grounds, it has been held that a resident or citizen is not entitled to assail an act on the ground that it discriminates against those who are not residents or citizens. *Boseman v. State*, 7 Ala. App. 151, 61 So. 604; *Schmidt v. Indianapolis*, 168 Ind. 631, 80 N. E. 632, 14 L. R. A. (N. S.) 787, 120 Am. St. Rep. 385; *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443; *State v. Kirby*, 34 S. D. 281, 148 N. W. 533.²³

The constitution of Utah, article 16, section 5, provides: "The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation." It is held that section 72 of the Industrial Commission Act providing for election between compensation for death under the act or damages in a law action, and under section 73 for waiver of the right to bring a law action by application for compensation, is not violative of the above provision of the Constitution as abrogating the right

23. *Klamath S. S. Co. v. Industrial Accident Commission*, 177 Cal. 767, 177 Pac. 848, 3 W. C. L. J. 404; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. Ed. 364, 7 N. C. C. A. 550; *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 39 Sup. Ct. 227, 3 W. C. L. J. 553.

of an adult to recover damages for death under Compiled Laws 1888, section 3178, 3179; an adult being capable of making an election.²⁴

In a California case the court said: "The Constitutional provisions authorizing the Workmen's Compensation Law of necessity uses the terms 'employer' and 'employee' (article 20 section 21), and it must follow that in defining the terms employer and employee in any statute passed in pursuance thereto no definition therein contained can enlarge the scope of the constitutional authority."²⁵

In so far as section 27 of the New York Act as amended by Laws 1917 c. 705, section 7, authorizes the state Industrial Commission to require mutual insurers and self-insurers, whose solvency was not doubted, to pay into the state fund the present value of future installments of compensation under awards for death claims, it is unconstitutional, as discriminating against such insurers and in favor of others.²⁶

"The provision of the Constitution of the state (New York), 'The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation' (article 1, sec. 18), is not relevant to the determination of the rights arising, through section 29, to the dependents of the deceased employee. The people of the state, in section 19 of article 1 of the Constitution, restricted that provision from disabling the Legislature to enact laws for the payment, in any method it selected, of compensation for death of employees resulting from injuries to them, and to provide that the right of such compensation and the remedy therefor shall be exclusive of all other rights and remedies for death resulting from such injuries. The power to provide that a party who negligently kills an employee under the act shall be liable to the dependents

24. *Garfield Smelting Co. v. Industrial Comm. of Utah*, — *Utah* —, 178 Pac. 57, 3 W. C. L. J. 531.

25. *Aetna Life Ins. Co. v. Indus. Comm.*, 179 Cal. 432, 177 Pac. 273, 3 W. C. L. J. 407.

26. *Sperduto v. New York City Interborough Ry. Co.*, 173 N. Y. Supp. 834, 3 W. C. L. J. 503.

of the employee, as defined by the act, and not to his next of kin, is clearly restored to the Legislature by the later section. See *Shanahan v. Monarch Engineering Co.*, 219 N. Y. 469, 114 N. E. 795." ²⁷

The fact that the Illinois Act does not require townships to make an election to escape the provisions of the act does not make it invalid as the Legislature had the power to make townships liable for damages to employees employed by its officers whether caused by the torts of its officers or as mere incidents of the employment.²⁸

The provision of the Nevada Act making counties subject thereto is not unconstitutional as depriving counties of due process of law, the money required to be paid by the counties going for a public purpose of supporting the indigent, which is a legitimate charge on the people of the state and its various subdivisions.²⁹

The Wyoming Act does not violate the state constitution providing compensation, "to each person injured" in that no compensation is allowed for the first ten days of disability. "This is a proper regulation and classification * * * made to protect the employer from those workmen who might prefer to remain idle and draw compensation when really able to pursue their usual avocations."³⁰

The California Workmen's Compensation Act authorizing compensation to an employee for injuries received outside of the state where the contract of employment was made within the state, merely attaches an additional incident to a contract made within the state, and is not unconstitutional, as transcending the powers of the state to enact.³¹

27. *Travelers' Ins. Co. v. Padula Co., Inc.*, 224 N. Y. App. 397, 121 N. E. 348, 3 W. C. L. J. 339.

28. *McLaughlin v. Industrial Board*, 281 Ill. 100, 117 N. E. 819, 1 W. C. L. J. 504.

29. *Nevada Industrial Comm. v. Washoe County*, 41 Nev. 437, 171 Pac. 511, 1 W. C. L. J. 1088.

30. *Zancanelli v. Central Coal etc. Co.*, 25 Wyo. 511, 173 Pac. 981, 1 W. C. L. J. 715.

31. *Quong Ham Wah Co. v. Indus. Acc. Comm. of Cal.*, — Cal. —, (1920) 192 Pac. 1021, 7 W. C. L. J. 12.

The provisions of the Wisconsin Act, allowing treble damages in cases where a minor of permit age is allowed to work without a permit, is constitutional.³²

The Tennessee Act is not unconstitutional because it provides that an employee must submit to an examination and accept medical services and denies to him the right of compensation so long as he refuses.³³

The Montana Act is unconstitutional in so far as it provides for the Supreme Court trying compensation cases "anew" on appeal from the district court, since "the source of all power vested in the Supreme Court is the Constitution of the State, and in it must be found the measure of jurisdiction," and the trial of a case *de novo*, which was not originally before it, is not one of the powers granted by the constitution.

"As district courts are courts of original jurisdiction, it was within the constitutional power of the Legislature to provide that the trial in the district court shall be *de novo*, but the Montana Act has provided that they should have power of review only."³⁴

Some of the acts classify employments as "hazardous," "extra hazardous" and "especially dangerous" enumerating the list of employments that are covered by the acts. Such classification has been sustained by numerous decisions of the supreme court.³⁵

Classification of employments, so as to cover all industries, except domestic and agricultural (casual employees excepted), being elective as to excepted classes, is constitutional and

32. *Mueller & Son Co. v. Gothard*, — Wis. —, (1920), 179 N. W. 576, 6 W. C. L. J. 730.

33. *Scott v. Nashville Bridge Co.*, — Tenn. —, (1920), 223 S. W. 844, 6 W. C. L. J. 580.

34. *Willis v. Pilot Butte Mining Co.*, — Mont. —, (1920), 190 Pac. 124, 6 W. C. L. J. 355.

35. *State ex rel. Davis-Smith v. Clausen*, 65 Wash. 156, 3 N. C. C. A. 599, 37 L. R. A. (N. S.) 466, 117 Pac. 1101 (1911); *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 9 N. C. C. A. 286, 109 N. E. 600, (1915). Affirming 167 App. Div. 945, (1915); *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 1 N. C. C. A. 517, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156 (1911).

valid.³⁶ The various classifications have been held not to violate any constitutional provision.³⁷

That the acts of the states, based upon state insurance and other compensation acts, do not contravene the constitutional provision as to "due process of law" is sustained by the supreme court decisions of many states.³⁸

That the provisions of a compulsory workmen's compensation act based upon state insurance are not in contravention of the State and Federal (seventh amendment) Constitutional provisions guaranteeing a right of trial by jury have been sustained by the decisions of the Supreme Court of Washington.³⁹

Provisions of the act which authorize state boards to levy insurance premiums, on employers covered by the acts, of the na-

36. *Western Indemnity Co. v. Pillsbury*, — Cal. —, 151 Pac. 398, 10 N. C. C. A. 1.

37. *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 3 N. C. C. A. 569; *Matheson v. Minn. St. Ry. Co.*, 126 Minn. 286, 5 N. C. C. A. 871; *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517.

38. *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 3 N. C. C. A. 599, 37 L. R. A. (N. S.) 466, 117 Pac. 1101 (1911); *Borgnis v. Falk Co.*, 147 Wis. 327, 3 N. C. C. A. 649, 37 L. R. A. (N. S.) 489 (1911); *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 9 N. C. C. A. 286, (1915). *Aff'g* 167 App. Div. 945 (1915); *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L. R. A. (N. S.) 694 (1912); *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 3 N. C. C. A. 569 (1913); *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 5 N. C. C. A. 401, Ann. Cas. 1915A, 241 (1914); *Matheson v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 5 N. C. C. A. 871, (1914); *Shade v. Ash Grove Lime & Portland Cement Co.*, 92 Kan. 146, 5 N. C. C. A. 763, 139 Pac. 1193 (1914), rehearing 93 Kan. 257, 144 Pac. 249 (1914); *Memphis Cotton Oil Co. v. Tolbert*, — Tex. Civ. App. —, 7 N. C. C. A. 547, 171 S. W. 309 (1914).

39. *Dominguez v. Pendoia* — Cal. —, (1920) 188 Pac. 1025, 6 W. C. L. J. 3. *State ex rel. Davis-Smith v. Clausen*, 65 Wash. 156, 3 N. C. C. A., 599, 37 L. R. A. (N. S.) 466, 117 Pac. 1101 (1911); *Yapple v. Creamer*, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L. R. A. (N. S.) 694 (1912); *New York (Jensen v. Southern Pac. Co. 215 N. Y. 514, 9 N. C. C. A. 286, 109 N. E. 600 (1915) Aff'g. 167 App. Div. 945 (1915) Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 1 N. C. C. A. 720, 119 Pac. 554 (1911); Texas Power & Lights Co. — Tex. Civ. App. —, 9 N. C. C. A. 847, 178 N. W. 956 (1915).*

ture of an indirect tax, to collect the same and place them in a state insurance fund, out of which said boards pay compensations to injured workmen, or to dependents do not violate the "due process of law" provisions of the State and Federal Constitutions,⁴⁰ (except where the state constitutions contain provisions expressly prohibiting the legislature to limit by legislative acts the amount of damages an injured employee may recover for a personal injury).⁴¹

The employers liability act is not invalid as making the employee without his consent, a party in a contract between the employer and Insurance carrier, as the employee is not made a party to such contract, but is merely given a right of action thereon as additional security, and the nullity of such provision would not entail the nullity of the entire act, under the express provision of section 41 of the act.⁴² Nor is it unconstitutional because taking away the employee's right of action under the general law of torts.⁴³

The provision of the act relative to fees to attorneys does not deny the right of an employee to be represented by counsel, since the state has made provision that the states attorney will when requested act for the injured party. Nor is the act unconstitutional in providing that children over the age of 16 shall not be considered dependents unless incapacitated. The amendment of 1917 providing that nonresident alien dependents shall receive only 33 per cent of the amount allowed to residents of the state does not invalidate the act.⁴⁴

40. *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 9 N. C. C. A. 286, 109 N. E. 600.

41. *Kentucky State Journal Co. v. Workmen's Compensation Board*, 161 Ky. 562, 7 N. C. C. A. 568, 170 S. W. 1166.

42. *Boyer v. Crescent Paper Box Factory*, — La. —, 78 So. 596, 2 W. C. L. J. 71.

43. *N. Y. C. R. C. v. Sarah White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D 1, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Boyer v. Crescent Paper Box Factory* — La. —, 78 So. 596, 2 W. C. L. J. 71; *Johnston v. Kennecott Copper Corp. (C. C. A.)* 248 Fed. 407, 2 W. C. L. J. 15; *Williams v. Blodgett Const. Co.* — La. —, (1920) 84 So. 115, 6 W. C. L. J. 53.

44. *Zancanelli v. Central Coke & Coal Co.*, — Wy. —, 173 Pac. 981, 2 W. C. L. J. 715.

The legislature has power to limit reviews and make them conclusive except as to reviews by the proper courts named in the Statute.⁴⁵

The Iowa Act does not interfere with existing contracts, therefore it is not unconstitutional as impairing the obligation of contracts. Whenever any liberty is left on which to contract, a new contract or a change in contract made by contract cannot be objected to as an invalid impairment. The Iowa Act being elective, cannot work an impairment of the obligation of contracts and is a valid exercise of the police power of the state.⁴⁶

While the Texas Act denies to non assenting employers the right to interpose the defenses of fellow servant, assumed risk and contributory negligence, in negligence cases that does not render the act unconstitutional as to such employers, the right withdrawn being neither a vested right nor a property right; the defenses denied being but doctrines or rules of the common law and not defenses which affect the employers' substantial equities, and no absolute liability is imposed since the substantial defense of absence of negligence is expressly preserved by the act.⁴⁷

The fact that the provision, that alien dependents receive only one-half the amount payable to residents, is invalid does not invalidate the remainder of the act since it may be eliminated and still retain the remainder of the act. Establishing a board does not violate the constitutional provision that no courts other than provided for by the constitution shall be established since the board is not a court and ample provision is made for review by the courts. The fact that the act makes a child *sui juris* does render it invalid.⁴⁸

45. *Thaxter v. Finn*, — Cal. —, 173 Pac. 163, 2 W. C. L. J. 431.

46. *Hunter v. Colfax Coal Co.*, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886; *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873; *Hawkins v. Blakley*, 243 U. S. 210, 61 L. Ed. —, 37 Sup. Ct. R. 255, 13 N. C. C. A. 959; *Sayles v. Foley* — R. I. —, 96 Atl. 340, 12 N. C. C. A. 949.

47. *Middleton v. Texas Power & Light Co.* — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873; *Sayles v. Foley*, — R. I. —, 96 Atl. 340, 12 N. C. C. A. 949.

48. *Greene v. Caldwell*, — Ky. —, 186 S. W. 648, 12 N. C. C. A. 520.

A provision in the employers' liability act for the addition of 50 per centum for waiting time for delinquent payments after 30 days notice has been given is reasonable, and is not unconstitutional as depriving the party liable, of property without due process of law.⁴⁹

"In the exercise of the power granted by section 35, article II, of the Constitution, of Ohio to pass a compulsory compensation law, the general assembly is authorized to include all such reasonable provisions as are necessary to make the law effective and to accomplish the purpose expressed in the constitutional provision referred to.

"The line which separates power to make laws from power to interpret and apply laws is not exactly defined. The legislature cannot confer upon tribunals, other than courts, powers which are strictly and conclusively judicial. But in providing for the enforcement of its enactments, it may clothe administrative officers with power to ascertain whether certain specified facts exist, and thereupon to act in a prescribed manner, without delegating to such officers legislative or judicial power within the meaning of the Constitution.⁵⁰

The provisions of the Ohio Act allowing employers of sufficient financial ability to carry their own insurance does not violate the "equality before the law" provisions of the Constitution.⁵¹

The Texas Act was held unconstitutional in so far as it was compulsory as to employees while elective to employers.⁵²

The court in construing and holding constitutional the provision of the California Act providing for an increase of fifty per cent. where an injury to an employee was due to the willful misconduct of the employer, said, "The Constitution, as it stood at the time the legislation in force on June 7, 1919, was enacted, empowered the Legislature to create a liability on the part of

49. U. S. Fidelity & Guar. Co. v. Wickline — Neb. —, 170 N. W. 193, 18 N. C. C. A. 664.

50. Fassig v. State, — Ohio —, — N. E. —, 13 N. C. C. A. 845.

51. State ex rel. Turner v. U. S. Fidelity & Guaranty Co. of Baltimore Md., — Ohio St. —, 117 N. E. 232, 15 N. C. C. A. 765.

52. Middleton v. Texas Light & Power Co., — Tex. Civ. App. — 173, S. W. 956, 9 N. C. C. A. 847.

employers 'to compensate their employees' for any injury received in the course of their employment, 'irrespective of the fault of either party.' Article 20, Par. 21. This language does not authorize the creation of a liability for anything more than compensation. If the 50 per cent to be added in cases where the injury is caused by the willful misconduct of the employer is given as a penalty on the employer for such misconduct, and not as compensation to the employee for his injury, the provision is not within the power given to the Legislature by said section, and if it has no other sanction, it is beyond the legislative power and void.

"All presumptions are to be indulged in favor of the validity of an act of the Legislature. It is therefore to be assumed the Legislature found that the actual injury by loss of earnings and other elements of damage, not including expenses for costs of treatment and the like, would be at least 50 per cent. more than the fixed schedule would come to, and that it was deemed just, if the injury was caused by willful misconduct of the employer, he should be made to pay a greater proportion of the burden, and the allowance in such a case should be increased by adding 50 per cent thereto. Thus considered, the additional allowance is really for additional compensation in the strict sense, and not for exemplary damages. This being the case, the power to enforce it was properly given to the commission under the provision of section 21, article 20, of the Constitution."⁵³

A provision of the compensation act allowing living expense to the wife and minor children of an injured employee who has deserted or is neglecting his family, is not unconstitutional in permitting the wife to proceed in behalf of the community to secure the property belonging to the community when the husband has failed in his duties to his family.⁵⁴

A provision of the Louisiana Act authorizing the district court to require an employer, against whom an award has been made,

53. *E. Clemens Horst Co. v. Ind. Acc. Comm.*, — Cal. —, (1920), 193 Pac. 105, 7 W. C. L. J. 3.

54. *Northwestern Redwood Co. v. Indus. Comm.*, — Cal. —, (1920). 194 Pac. 31, 7 W. C. L. J. 262.

to furnish a bond when it determines that the employer's solvency is questionable, is violative of Art. 96 of the Louisiana Constitution which provides that no functions except such as are judicial shall ever be attached to the district court or the justices thereof; the determination of the solvency of an employer under the compensation act cannot be said to be judicial.⁵⁵

The provision of the Maine Act, providing for the exclusive determination of issues of fact, in the absence of fraud, by the chairman of the Industrial Accident Commission, is not violative of the constitution.⁵⁶

§ 6. Presumption of and Notice of Election and Rejection.— Under the acts of a number of states,⁵⁷ all employees and private employers, subject to certain exceptions provided in the acts, are presumed to have elected to come under the act unless they give written notice to the Workmen's Compensation Board or other specified officer,⁵⁸ and under most acts, to each other, of their desire to reject the act. It has been held that receivers under their general powers may accept or reject an elective act.⁵⁹ Usually the notice of rejection must be given within a specified time prior to the happening of the accident resulting in dis-

55. *In re Southern Cotton Oil Co.*, — La. —, (1920), 86 So. 656, 7 W. C. L. J. 304.

56. *Mailman v. Record Foundry & Mach. Co.*, — Me. —, 106 Atl. 606, 4 W. C. L. J. 205.

Note—For constitutionality of provisions pertaining to aliens see Section 375.

57. Ala., Conn., Ind., Kan., Ia., La., Minn., Mo., Nebr., Nev., N. J., Penn., Va., Tenn., Wis.

58. *Beveridge v. Illinois Fuel Co.*, 283 Ill. 31, 119 N. E. 46, 17 N. C. C. A. 463; *Curran v. Wells Bros. Co.*, 205 Ill. App. 307, 17 N. C. C. A. 470; *Rice v. Garrett*, — Tex. Civ. App. —, 194 S. W. 667, 17 N. C. A. 466; *Garrett v. Anglo-American Provision Co.*, 205 Ill. App. 411, 17 N. C. C. A. 466; *Texas Employers Ins. Ass'n v. Downing*, — Tex. Civ. App. —, 218 S. W. 112, 5 W. C. L. J. 582.

59. *Devine v. Delano*, 272 Ill. 166, 17 N. C. C. A. 464.

ability to the employee.⁶⁰ With one exception⁶¹ presumption of election has been considered by the courts to be proper.⁶²

In 1917 the elective feature of the Illinois act was abrogated as to the hazardous occupations set out in Section 3, of the act. Prior to that time employers included within that section were conclusively presumed to have elected to be bound by its terms, unless a contrary intention had been manifested as provided in the act.⁶³ No presumption of election to come under that act exists as to occupations not included in Section 3, of the act. "As the defendant in error was not engaged in any occupation referred to in Section 3, and there was no election on his part or on the part of the employer to come under the Compensation Act, it follows that they were not operating under said act, and that the Industrial Commission was without jurisdiction to award the compensation in this case, and the circuit court erred in affirming the award and quashing the writ of certiorari."⁶⁴

60. *Harris v. Hobart Iron Co.*, 127 Minn. 399, 149 N. W. 662; *Reynolds v. Chicago City Ry. Co.*, 287 Ill. 124, 122 N. E. 371; *Great Northern Ry. Co. v. King*, — Wis. —, 161 N. W. 371, B. 1 W. C. L. J. 1673; *Krisman v. Johnson City & B. M. Coal & Min. Co.*, 190 Ill. App. 612; *Gregutis v. Waclark Wire Works*, 86 N. J. L. 610, 92 Atl. 354; *Garrell v. Battelle*, 93 Kan. 370, 144 Pac. 244; *Great Northern Ry. Co. v. King*, — Wis. —, 161 N. W. 371, 17 N. C. C. A. 465; *Wiesdippe v. Zwiefel*, — Wis. —, 160 N. W. 1038; *Colwell v. Bedford Stone & Construction Co.*, — Ind. App. —, (1920), 126 N. E. 439, 5 W. C. L. J. 823; *Johnson v. Choate*, — Ill. —, 119 N. E. 972, 2 W. C. L. J. 458; *Friebel v. Chicago City Ry. Co.*, — Ill. —, 117 N. E. 467, 1 W. C. L. J. 18; *Hagenback v. Leppert*, — Ind. App. —, 117 N. E. 531, 1 W. C. L. J. 64.

61. In Kentucky this provision was deemed objectionable, *State Journal v. Workmen's Compensation Board*, 162 Ky. 387, 172 S. W. 674, L. R. A., 1916A, 402, Aff'g, 161 Ky. 562, 170 S. W. 1166, L. R. A. 1916A, 389, Ann. Cas. 1916B, 1273.

62. *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620; *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 105 N. E. 289; *Shade v. Grove Lime & Portland Cement Co.*, (1914) 92 Kan. 146, 139 Pac. 1193; *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Texas Employer's Ins. Ass'n v. Downing*, — Tex. Civ. App. —, 218 S. W. 112, 5 W. C. L. J. 582.

63. *Bishop v. Bowman Dairy Co.*, 198 Ill. App. 312 (1916); *Palmieri v. Illinois Third Vein Coal Co.*, 208 Ill. App. 405 (1917); *Friebel v. Chicago City Ry. Co. et al.*, 280 Ill. 76, 117 N. E. 467, 16 N. C. C. A. 390; *Witchita Falls Motor Co. v. Meade*, 203 S. W. 71, 2 W. C. L. J. 135.

64. *Seggebruch v. Industrial Comm. et al.*, 288 Ill. 163, 123 N. E. 276, 4 W. C. L. J. 156; *Vaughan's Seed Store v. Simonini*, 275 Ill. 477, 114 N. E. 163, 14 N. C. C. A. 1075.

On the question of whether the employer has brought himself under the Illinois Act the Supreme Court of that state said, "whether or not an employer elects to operate under the act is a question of fact. Paragraph (a) requires that notice of such election shall be filed with the commission but does not prescribe a particular form of notice to be used, and where the employer, as in this case, upon the receipt of a demand that he comply with section 26, satisfies the commission of such compliance and receives its certificate to that effect, which action on his part he explains as having been the result of his determination to operate under the act, he cannot be heard to say that he had not elected to come under the act merely because he had not filed formal notice of such election with the commission."⁶⁵

Under the Illinois Act the presumption of acceptance extends to a carrier by land,⁶⁶ and where the employer made no election to accept or reject the act it was held that there was a legal presumption that he was under the act and the employee could not reject the act while the employer was subject thereto.⁶⁷ Although an employer elects to pay compensation under the Illinois Act an employee will not be bound by such election where the employer does not furnish a statement or post notices of his election as provided by the act.⁶⁸ But where the employer wrote a letter indicating a rejection of the act and inquired what further must be done to reject and posted typewritten and signed notices in its place of business as required by the act these acts, in the absence of rules to the contrary were held to constitute a rejection of the act.⁶⁹ Under the Illinois act notice of re-

65. *Paul v. Industrial Comm.*, 288 Ill. 532, 123 N. E. 541, 4 W. C. L. J. 371; *Ellsworth v. Indus. Comm.*, 290 Ill. 514. .

66. *Cously v. Chicago & A. R. Co.*, 207 Ill. App. 565, 17 N. C. C. A. 465; *State v. District Court of St. Louis Co.*, — Minn. —, (1920), 176 N. W. 749. 5 W. C. L. J. 711.

67. *Means v. Terminal Railroad Assn. of St. Louis*, 202 Ill. App. 591, 17 N. C. C. A. 470.

68. *Curran v. Wells Bros. Co.*, 215 Ill. App. 37; *Reynolds v. C. C. Ry. Co.*, 287 Ill. 124; *Garrett v. Anglo-American Provision Co.*, 205 Ill. App. 411.

69. *A. T. Whlet Co. v. Indus. Comm.*, 287 Ill. 487, 122 N. E. 864, 4 W. C. L. J. 44.

jection, after having once elected, must be filed sixty days prior to the first of January, otherwise the employer will continue to be bound by the act for another year."⁷⁰

It was held in a Kansas Case that, where the employer rejected the act, which was later very materially amended, but still contained the same presumption of acceptance, the act then applied to the employer in the absence of a second notice of rejection.⁷¹

In another Kansas case the court said: "For the reason set out in the opinion in *Railway Co. v. Fuller*, 186 Pac. 127, which was argued and submitted together with this case, it is held that under the law as it now exists, all employers of five or more workmen, engaged in industries characterized by the statute as especially dangerous, are subject to the compensation system, except where notice to the contrary has been given subsequent to the adoption of the act of 1917 (chapter 226) in relation thereto, irrespective of what may have been done before that time."⁷²

Where the act provides that the employee must also notify his employer of his rejection of the act, or vice versa, such provision must be complied with strictly, otherwise the presumption in favor of election will prevail.⁷³ Or where the act provides that the employer must give notice to his employees of his election to come under the act, and he fails to give the statutory notice to the employees, his election is not binding upon employees who had no knowledge of his election to operate under the act.⁷⁴

70. *Victor Chemical Works v. Industrial Board*, 274 Ill. 11.

71. *Chicago R. I. & P. Ry. Co. v. Fuller*, 105 Kan. 608, 186 Pac. 127, 5 W. C. L. J. 386.

72. *Wegele v. Ismert-Hincke Milling Co.*, 105 Kan. 615, 186 Pac. 130, 5 W. C. L. J. 391.

73. *Quart v. Simmons*, 231 Mass. 313, 121 N. E. 10, 3 W. C. L. J. 136; *Beveridge v. Illinois Fuel Co.*, 283 Ill. 31, 119 N. E. 46, 17 N. C. C. A. 463; *Bernard v. Michigan United Traction Co.*, 188 Mich. 504, 154 N. W. 565; *Platt v. Swift & Co.*, 188 Mo. App. 584, 176 S. W. 454; *White v. Fuller Co.*, 276 Mass. 1, 114 N. E. 829; *Barnes v. Illinois Fuel Co.*, 283 Ill. 173; *Davis v. St. Paul Coal Co.*, 286 Ill. 64; *Wiesedeppe v. Zweifel*, — Wis. —, 160 N. W. 1038, B 1 W. C. L. J. 1701.

74. *Batson Milholme Co. v. Faulk*, — Tex. Civ. App. —, 209 S. W. 837, 3 W. C. L. J. 805; *Van Vliissingen v. Lenz*, 171 Ill. 162; *Kampmann v. Cross*, — Tex. Civ. App. —, 194 S. W. 437, B 1 W. C. L. J. 1561.

In a Texas case in which an employer was sued for damages by an employee the court said: "Since no proof was offered upon the hearing of the pleas to support the allegation that the written or printed notice had been given to Poe by the Continental Oil and Cotton Company, as required by article 5246x and 5246xx Vernon's Sayles' R. S., it must be presumed that no such notice was given. * * * Since such notice had not been given, Poe had the right to institute a suit in the courts against Guitar to recover damages for personal injuries. See also *Farmers' etc., v. Shelton*, 202 S. W. 194, *Batson-Milhome Co. v. Faulk*, 209 S. W. 837. But while this was his privilege we do not think that Poe was limited thereto; but if he saw fit to do so he could waive the provisions with reference to notice, claim the benefit of the act, and enforce against Guitar and his insurer, before the industrial Accidental Board the liability for compensation imposed by the Employer's Liability Act. The right to waive notice was recognized in *Rice v. Garrett*, 194 S. W. 667."⁷⁵

§ 7. Requirements as to Notice of Election.—In discussing the necessity of strict compliance with the statute in the matter of notice of election and rejection of the act the Texas Civil Appeals court says: "As notice, then, determines the question of the election of the employee, and so vitally affects the liability of the parties entering into the contract of employment, in the event of injury to the employee, and the statute itself has provided that the notice which thus forms the basis of a liability different from what it would otherwise be, shall be 'in writing, or print,' it seems to us that the employer, in order to establish the election of the employee and that the contract of employment, was thus made subject to the terms of the compensation act, should show that the notice in writing or print was given or that the employee waived such notice."⁷⁶

75. *Poe v. Continental Oil & Cotton Co.*, — Tex. Civ. App. —, 211 S. W. 488, 4 W. C. L. J. 138.

76. *Rice v. Garrett*, — Tex. Civ. App. —, 194 S. W. 667, 17 N. C. C. A. 466; *Great Northern Ry. v. King*, 165 Wis. 159, 161 N. E. 371, 17 N. C. C. A. 465; *Danies v. Chas. Boldt Co.*, 78 W. Va. 124, 88 S. E. 613, 17 N. C. C.

"When courts permit the question of notice to become one of fact, they have given the employers the benefit of as generous a construction of the statute as it will bear, for laws depriving citizens of rights possessed by them should be strictly construed, and a strict construction of the statute might require the placing of a written or printed notice in the hands of each employee in order to deprive him of his common-law right to go into a court and prove his damages."⁷⁷

"It might be well to say that it is the opinion of this court that the posting of notices alone, without any fact or circumstance going to show that the employee had read or become acquainted personally with the notice, would not be sufficient, but that the act is not only mandatory, and requires the actual giving of written or printed notice by the employer to the employee, and that these facts should not be left to presumption, but should rest upon actual proof. The fact, as contended by appellant, that Section 19, pt. 3, of the Act of 1913, is not followed by words of prohibition, could not and would not, in our opinion, render the said clause any the less mandatory and compelling; and the fact, if it be a fact, that there were posted upon the premises on and about which appellee worked notices that it had provided for payment of compensation to its injured employees under the Employers' Liability Act, c. 179, General Laws of the Thirty-Third Legislature and amendments thereto, by insuring with the Texas Employers' Insurance Association of Dallas, Tex., would be only an evidence, not conclusive but admissible only, to show that the employee had actual notice as required by the statute."⁷⁸

In an action at law against an employer, where it appears that the employee prosecuted a claim under the act to final adjudication, the question of notice to the employee by the employer of

A 472; *Reynolds v. C. C. Ry. Co.*, 287 Ill. 124; *Barnes v. Illinois Fuel Co.*, 283 Ill. 173, 17 N. C. C. A. 478; *Davis v. St. Paul Coal Co.*, 286 Ill. 64; *Consol. Kan. City Smelting & Refining Co. v. Deap*, — Tex. Civ. App. —, 189 S. W. 747, B 1 W. C. L. J. 1551.

77. *Kampmann v. Cross*, — Tex. Civ. App. —, 194 S. W. 437.

78. *Farmers' Petroleum Co. v. Shelton*, — Tex. Civ. App. —, 202 S. W. 194 (1918), 17 N. C. C. A. 477..

the latter's compliance with the act is immaterial. The court said: "This we think sufficiently shows he accepted as such employee, provided the board find that he fell within the class of employees defined within the act."⁷⁹

In an Iowa case the employer filed a written notice of rejection of the act with the industrial commission and posted notices about his plant to that effect. Later he accepted the provisions of the act and tore down the notices about the plant. The court held that this was not a sufficient acceptance of the act. The Iowa Act provides that waiver of rejection of the act shall be accomplished in the same manner as when the act is accepted. This requires the filing of notice of acceptance with the industrial commissioner and the posting of notices "in some conspicuous place at the place where the business is carried on." Tearing down the notices was not a substantial compliance with the law. Had plaintiff had actual notice it would have been binding upon him, but it was not shown that he had such notice, and failure to post notice was not excused because of the fact that the injured workman was a foreigner who could not read the notice when printed in the English language.⁸⁰

Under the Louisiana Act there is a presumption that the Act applies even though the accident occurs within 30 days after the date of the contract of employment and notice of rejection by an employee must be given 30 days prior to an accident. "It must be observed therefore that an agreement of election that the statute shall apply to a contract of employment need not be expressed but may be implied, and that, as far as subsection 1 goes, the agreement, whether expressed or implied, need not be in existence 30 days, but must be merely 'prior to the injury,' to have the effect of making the statute applicable to the case."⁸¹

79. *Texas Refining Co. v. Alexander*, — Tex. Civ. App. —, 202 S. W. 131; *Pavia v. Petroleum Iron Works of Pa.*, —, N. Y. App. —, 164 N. Y. S. 790, B. 1 W. C. L. J. 1385.

80. *Paucher v. Enterprise Coal Mining Co.*, 182 Iowa 1084, 164 N. W. 1035; 17 N. C. C. A. 469; *Beveridge v. Ill. Fuel Co.*, 283, Ill. 231, 119 N. E. 46, 16 N. C. C. A. 463; *Rev'g*, 206 Ill. App. 145.

81. *Philps v. Guy Drilling Co.*, 143 La. 951, 79 So. 549, 17 N. C. C. A.

An employer cannot escape liability upon failure to post the proper notices by showing that he had requested said notices to be furnished by the state authorities but none were furnished, for the statute makes no provision for the furnishing of notices by the state.⁸²

Under the New Jersey Act the statute provides that an employer of minors must, upon rejection of the act, give actual notice to the parents or the guardian of the minor, otherwise the act will be presumed to apply.⁸³

Under the Michigan Act the court held that it was the evident intention of the legislature to place an employer under the act from the day of the filing of the statement and the approval by the board took effect as of the day of the filing of the notice and that under such circumstances the defendant was not deprived of his common law defenses to accidents occurring after such time of filing notice and before approval by the board. The court said: "The purpose of the legislature in making the approval of the board retroactive is plain. It was to prevent the penalizing of an employer by the denial to him of his common-law defenses after he had indicated his desire to come under the act, during the short period which must elapse between the filing of his election and its approval by the board."⁸⁴

Where a subcontractor employee failed to give notice to the chief employer, on whose vessel he was to work, that he rejected the act, it was held that he was bound by the provisions of the act.⁸⁵

Where an employer elects to come under the act, the employee wishing to retain his common law rights must give the required

469; *Overruling Woodruff v. Producer's Oil Co.*, 142 La. 368, 76 So. 803; *Boyer v. Crescent Paper Box Factory*, 143 La. 368, 78 So. 596, 17 N. C. C. A. 473, 2 W. C. L. J. 71.

82. *Daniels v. Chas. Boldt Co.*, 78 W. Va. 124, 88 S. E. 613, 17 N. C. C. A. 472.

83. *Troth v. Millville Bottle Works*, 89 N. J. L. 219, 98 Atl. 435; 15 N. C. C. A. 722; *Brost v. Whittall-Tatum Co.*, 89 N. J. L., 531, L. R. A. 1917D, 71, 99 Atl. 315, 15 N. C. C. A. 723.

84. *Bernard v. Michigan United Traction Co.*, 198 Mich. 497, 165 N. W. 846, 17 N. C. C. A. 473.

85. *Duart v. Simmons*, 231 Mass. 313, 121 N. E. 10, 3 W. C. L. J. 136.

notice to his employer even though the employer has failed to comply with part of the act.⁸⁶

In reference to a provision of the Louisiana act the court said: "Plaintiff also contends that the said act is inapplicable to this case, for the further reason that the notice required by section 12 of the act to be posted, was not posted. But by the very terms of said section the sole effect of failure to post said notice is to extend for six months the delay within which notice of the injury must be given to the employer."⁸⁷

The Porto Rico Workmen's Compensation Act makes it compulsory for employers as well as employees to operate under the act and neither may by election reject the act.⁸⁸

Under the Texas act where an employer has subscribed to the act but failed to give the statutory notice to employees, his election is not binding upon employees who had no knowledge of his election to operate under the act.⁸⁹

A stevedore, injured while loading, and entitled to the protection of the state compensation act, did not elect to come under the act, and waive his remedy in admiralty, by signing at the request of an attorney the notice to his employer contemplated by the compensation act. And after his claim had been filed with the commission he was permitted to withdraw it and proceed in admiralty.⁹⁰

In a Wisconsin case the Supreme court said it must assume that the legislature adopted with full understanding of its legal effect the language of a statute, providing that certain sections shall not apply to employees engaged in switching cars for a railroad

86. *Gilbert v. Wire Goods Co.*, 233 Mass. 570 (1919), 124 N. E. 479, 4 W. C. L. J. 714.

87. *Colorado v. Johnson Iron Works*, 146 La. —, 83 So. 381, 5 W. C. L. J. 392.

88. *Camunas v. New York & P. R. S. S. Co.* (1919) 260 Fed. 40, 4 W. C. L. J. 673.

89. *Batson-Milholme Co. v. Faulk*, — Tex. Civ. App. —, (1919) 209 S. W. 837, 3 W. C. L. J. 805.

90. *Siebert v. Patapaco Ship Ceiling & Stevedore Co.*, 253 Fed. 685, 3 W. C. L. J. 219.

company, unless both employer and employee have accepted the provisions of the act.⁹¹

Where the act of the state of Maine required an assenting employer who was conducting more than one business to specify which business he desired to conduct under the provisions of the act, a failure to so specify made him a nonassenting employer as to that branch of his business.⁹²

§ 8. **Proof of Election.**—In a Texas case in which the testimony was conflicting on the question of whether the requisite statutory notice had been given the employee by the employer so as to confine the employee's remedy to the act, the court said: "The Texas law does not recognize the giving of notice by posting, and we are not prepared to hold that mere posting in the place of business would as a matter of law be notice. It might under certain circumstances be sufficient to show that an employee had actual notice, while under other circumstances it might be insufficient to convey notice to the employee. The posting of notices might be sufficient to carry the question of notice to the jury, but could not be held notice by the court."⁹³

Under the Texas act the question of whether the subscribing employer has complied with the act in the matter of notice so as to bring his employee under the act is properly a question to be established at the trial of the employee's suit for damages at common law. Evidence is admissible as to the posting of notices after the accident, being material and pertinent as bearing upon the question as to whether the employer was to the knowledge of the injured employee a subscriber under the act.⁹⁴

In proving that an employer has elected to reject the Illinois Workmen's Compensation Act of 1911, a copy of the notice of

91. *Waldum v. Lake Superior Terminal & Transfer Co.* 169 Wis. 137, 170 N. W. 729, 3 W. C. L. J. 671.

92. *Fournier's Case*, — Me. —, 1921, 113 Atl. 27.

93. *Kampmann v. Cross*, — Tex. Civ. App. —, 194 S. W. 437 (1917) 17 N. C. C. A. 473.

94. *Kampmann v. Cross*. — Tex. Civ. App. —, 194 S. W. 437, 17 N. C. C. A. 474; *Ellsworth v. Indus. Comm.*, 290 Ill. 514.

election certified to by the person having charge of the original is admissible as the best evidence.⁹⁵

It has been held that proof of the filing of notice with the Industrial Board as to election to accept or reject the Illinois Workmen's Compensation Act of 1913, in compliance with the act, is sufficiently made by proving a copy of the notice filed, certified by the secretary of the board, and under its seal.⁹⁶

It is held in Illinois that the posting of the statutory notices of election and rejection of the act may be proved by those who saw the posted notices and especially where the notice had become dimmed or destroyed.⁹⁷

In an action by an employee against his employer a certified copy of a notice dated after the accident and showing that the employer elected to come under the act as of that date and had not been under it before is competent as an admission that the employer was not under the act at the time the notice was filed.⁹⁸

It has been held that where an employer who has been sued for damages claims the benefits of the Maryland Compensation Act he must plead and prove compliance with the act.⁹⁹

In a California case where an employee sued for damages and did not allege in his complaint that the defendant had accepted the act of 1911 but did allege negligence, in overruling a demurrer to the petition the court said: "If such election had been made, the fact would be within the knowledge of the defendants, and we think that the burden was upon them to plead such fact in bar of the action, if the fact existed. The plaintiff was entitled to assume that his ordinary right of action continued to exist."¹

In the absence of a special plea denying the allegations of the declaration alleging that the employer had elected to reject the

95. *Synkus v. Big Muddy Coal & Iron Co.*, 190 Ill. App. 602 (1919).

96. *Kleet v. Southern Illinois Coal & Coke Co.*, 197 Ill. App. 243 (1915).

97. *Kleet v. Southern Illinois Coal & Coke Co.*, 197 Ill. App. 243; *Volin v. St. Louis & O'Fallon Coal Co.*, 203 Ill. App. 126.

98. *Garrett v. Anglo-American Provision Co.*, 205 Ill. App. 411; *Haynes v. Saline County Coal Co.*, 206 Ill. App. 264.

99. *Salvuca v. Ryan & Reilly Co.*, 129 Md. 235; 98 Atl. 675.

1. *Mickel v. Althouse*, 38 Cal. App. 321, 176 Pac. 51, 17 N. C. C. A. 478.

act, proof as to the execution, filing and posting of notice respecting such election is waived.²

Where an employee was hired at a daily wage before the employer became subject to the compensation law, but the employer became subject to it 17 days before the accident, the employee was not required to file daily a notice with the employer that he rejected the act. He was not presumed to be bound by the act unless he remained in the same employment without rejecting the act for more than thirty days after the employer had become subject to the act.³

Where an administratrix brought an action at law for damages against one whose alleged negligence caused the death of her husband, and she was defeated on the merits, she did not thereby make an election which barred her claim under the compensation act for benefits to the widow and minor children.⁴

It was held under the Ohio Act that where an employer had elected to come under the act and filed his bond as required within the month of January, the mere fact that his bond was not approved by the Board until February 3rd, did not deprive him of the protection of the act as to an accidental injury occurring in January. He should not be penalized because of the delay of an administrative board in the performance of a ministerial duty.⁵

§ 9. **Effect, Contractual Nature of Election and Duress.**—If both employer and employee have elected to accept the act it is generally considered as becoming a part of their employment contract even though the contract was made before the act went into effect.⁶ Since an agreement or meeting of minds is necessary to

2. Haynes v. Saline County Coal Co., 206 Ill. App. 264.

3. Lemley v. Doak Gas Engine Co., — Cal. App. —, 180 Pac. 671,

4 W. C. L. J. 145 (1919).

4. State Indus. Comm. v. Brady & Gieo, 178 N. Y. S. 519, 5 W. C. L. J. 114.

5. Ginnochio v. Hydraulic Press Brick Co., 266 Fed. 564, 6 W. C. L. J. 615.

6. State ex rel. Nelson-Spellisey Co. v. Dist. Court of Meeker Co., 128 Minn. 221, 150 N. W. 623, 11 N. C. C. A. 636; Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245; Rounsville v. Central R. R. Co., 87 N. J. L. 371, 94 Atl., 392; Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211,

the making of a valid contract, the employee cannot accept the act and thereby bring his employer under it if the latter has rejected the act.⁷ Nor can the employer expect the employee to be bound by the act when the employer has rejected it.⁸

Likewise where the employer alone elects to come under the act he cannot thereby bring his employees under it unless the act so provides.⁹ Nor does the employer's election to come under the act after an accident happens to an employee give such employee the right to receive compensation from the employer for such accident.¹⁰ In both cases, where either the employer or employee rejects the act the parties are remitted to their action at law,¹¹ and are governed by the principles of law applicable to such actions except alone as to the matter of defenses.

Ann. Cas. 1915A, 241; *Drtina v. Charles Tea Co.*, 281 Ill. 259, 118 N. E. 69, 1 W. C. L. J. 320; *McRoberts v. National Zinc Co.*, 93 Kan. 364, 144 Pac. 247; *Shade v. Grove Lime & Cement Co.*, 92 Kan. 146, 139 Pac. 1193; *Lynch v. Pennsylvania R. R. Co.*, 88 N. J. L., 408, 96 Atl. 395; *Anderson v. North Alaska Salmon Co.*, 2 Cal. I. A. C. Dec. 241; *Gooding v. Ott*, 77 W. Va. 487, 87 S. E. 863; *Rodigen v. Sanitary Dist. of Chicago*, Bulletin No. 1, Ill. p. 129; *Kennerson v. Thames Towboat Co.*, 98 Conn. 367, 94 Atl. 497; *Shanahan v. Monarch Engineering Co.*, 219 N. Y. 469, 114 N. E. 795; *Doey v. Howland Co.*, 224 N. Y. 30, 120 N. E. 53, 2 W. C. L. J. 669; See *Martin v. Kennecott Copper Corp.* (D. C.) 252 Fed. 207, 2 W. C. L. J. 867; *Hagenback v. Leppert* (Ind. App.) 117 N. E. 531, 1 W. C. L. J. 64; *Reitmeyer v. Coxie Bros. & Co. Inc.* 264 Pa. 372, 1919, 107 Atl. 739, 4 W. C. L. J. 644; *Philps v. Guy Drilling Co.*, 143 La. 951, 79 So. 549, 17 N. C. C. A. 469; *Rogers v. Rogers*, — Ind. App. —, (1919), 122 N. E. 778, 4 W. C. L. J. 58.

7. *Favro, Admr. v. Superior Coal Co.*, 188 Ill. App. 203; *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 105 N. E. 289, 5 N. C. C. A. 419; *Price v. Clover Leaf Coal Mine Co.*, 188 Ill. App. 27.

8. *Crooks v. Tazewell Coal Co.* 263 Ill. 343, 105 N. E. 132, 5 N. C. C. A. 410, Ann. Cas. 1915C, 304; *Bendykson v. Lyons*, — Mich. —, 161 N. W. 945, 16 N. C. C. A. 744.

9. *Kampmann v. Cross*, — Tex. Civ. App. —, 194 S. W. 437, 17 N. C. C. A. 472; *Duart v. Simmons*, 231 Mass. 313, 121 N. E. 10, 3 W. C. L. J. 136; *Batson Milholme Co. v. Falk*, — Tex. Civ. App. —, 209 S. W. 837, 3 W. C. L. J. 805.

10. *Shevchenko v. Detroit United Ry. Co.*, 189 Mich. 421, 155 N. W. 423.

11. *Hughes v. Warman Steel Casting Co.*, 174 Cal. 44, 163 Pac. 885, 17 N. C. C. A. 517; *Hodges v. Swastika Oil Co.*, — Tex. Civ. App. 185 S. W. 369, 17 N. C. C. A. 519; *Synkus v. Big Muddy Coal & Iron Co.*, 190 Ill. App. 602, 17 N. C. C. A. 514; *Skelton & Wear v.*

It has been held in a case where the employer induced his employee by means of fraud, duress or undue influence to elect to come under the act, such election was only voidable and was affirmed by the employee's failure to repudiate such election, after discussing the effect thereof with his co-employees, and understanding that it affected his right to compensation.¹²

If both accept the act, they are as a general rule held to accept all its provisions, for themselves, their representatives, heirs, next of kin, dependents, etc., and are released from and deprived of all other rights against, and liabilities to, each other¹³ though not as to third persons.

Wolf, — Tex. Civ. App. —, 200 S. W. 901, 17 N. C. C. A. 479; Smith v. Hyne, — Mich. —, 175 N. W. 293, 5 W. C. L. J. 407; Barnett v. Coal & Coke Ry. Co., 81 W. Va. 251, 94 S. E. 150, 17 N. C. C. A. 514; Marshall v. City of Pekin, 276, Ill. 187; Wendzinski v. Madison Coal Corporation, 282 Ill. 32, 118 N. E. 435, 17 N. C. C. A. 517; Rev'g 203 Ill. App. 1; French v. Cloverleaf Mining Co., 190 Ill. App. 400; Balen v. Colfax Consol. Coal Co., 183 Ia. 1198, 168 N. W. 246, 2 W. C. L. J. 621; Crooks v. Tazewell Coal Co., 263 Ill. 343, 105 N. E. 132.

12. O'Rourke v. Cudahy Packing Co., 1 Conn. Comp., Dec. 8; Stricklen v. Pearson Const. Co., — Ia., —, 169 N. W. 628, 3 W. C. L. J. 291.

13. McRoberts v. National Zinc Co., 93 Kan. 364, 144 Pac. 247; Young v. Sterling Leather Works, 94 N. J. L. 289, 102 Atl. 395, 1 W. C. L. J. 653; State v. Carroll, 94 Wash. 531, 14 N. C. C. A. 932, 162 Pac. 593; Maloney v. Levy, etc., Co., 170 App. Div. 470, 163 N. Y. S. 505; Winter v. Dollger Brew Co., 175 App. Div. 706, 162 N. Y. S. 469; Consolidated Kansas City Smelting and Refining Co., v. Dean, (1916), — Tex. Civ. App. —, 189 S. W. 747; Peet v. Mills 76 Wash. 437, 136 Pac. 685, Ann. Cas. 1915 D, 154, 4 N. C. C. A. 786, L. R. A. 1916A, 358; Milwaukee v. Althoff, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A 327; White v. Fuller Co., 226 Mass. 1, 114 N. E. 829; Martin v. Kennecott Copper Corp. (D. C.) 252 Fed. 207, 2 W. C. L. J. 867. In Massachusetts it has been held that the adoption of the compensation principle by a child does not prevent a parent from recovering common law damages because of the child's death. King v. Viscolaid Co., 219 Mass. 420, 106 N. E. 988, 7 N. C. C. A. 254; In re Cripps v. Aetna Life Ins. Co., 216 Mass. 586, 104 N. E. 565; but see Hall v. Thayer & Co., 225, Mass. 151, 113 N. E. 644; Gregutis v. Waclark Wire Works, 86 N. J. L. 610, 92 Atl. 354; Rice v. Garrett (Civ. App.) 194 S. W. 667; Hartman v. Unexcelled Mfg. Co., 93 N. J. L. 418 (1919), 108 Atl. 367, 5 W. C. L. J. 422; Buonfigliis v. Neumann & Co., 93 N. J. L. 174 (1919). 107 Atl. 285, 4 W. C.

In a New York case the court said: "There does not appear to be any serious question that the claimant would be entitled to the award which has been made in this case, except for the fact that the present claimant, as administratrix of the estate of her decedent, brought an action in the Supreme Court to recover for the death of the intestate, in which action she was defeated upon the merits, and it is now urged that, having elected to sue, the claimant has made an election which operates as a bar to this proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67). The complete answer to this contention, it seems to us, is the fact that 'Clementina Balais, as administratrix of the goods, chattels, and credits of Giacomo Balais, deceased,' is in law, an entirely different person from 'Clementina Balais and minor dependents,' making a claim for compensation under the Workmen's Compensation Law. 'It has been repeatedly held,' say the court in *Leonard v. Pierce*, 182 N. Y. 432, 75 N. E. 313, 1 L. R. A. (N. S.) 161, 'that persons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons and strangers to any right or liability as an individual, and consequently a former judgment concludes a party only in the character in which he was sued. If the judgment was for or against an executor, administrator, assignee, or trustee, it would not preclude him, in action affecting him personally, from disputing the findings or judgment, although the same questions are involved.' Not only are the parties different, but the subject-

L. J., 521; *State Indus. Comm. v. Brady & Gloe*, 178 N. Y. S. 519 (1919), 5 W. C. L. J. 114; *Ruddy v. Morse Dry Dock & Repair Co.* (1919) 176 N. Y. S. 731, 4 W. C. L. J. 448; *Basso v. John Clark & Son, Inc.* (1919) 177 N. Y. S. 484, 4 W. C. L. J. 530; *Carlson v. Minneapolis St. Ry. Co.* (1919), 143 Minn. 129, 173 N. W. 405, 4 W. C. L. J. 513; *Stricklen v. Pearson Const. Co.*, — Iowa —, 169 N. W. 628, 3 W. C. L. J. 291; *Penn's Administrator v. Bates & Rogers Const. Co.*, 183 Ky. 529, 209 S. W. 513, 3 W. C. L. J. 731; *Nulle v. Hardman Peck & Co.*, 173 N. Y. S. 236, 3 W. C. L. J. 343; *Boyle v. A. C. Cheney Piano Action Co.*, 184 N. Y. S. 374 (1920), 7 W. C. L. J. 93; *Colorado v. Johnson Iron Works*, — La. —, 183 So. 381, 5 W. C. L. J. 392; *White v. Slattery Co.*, — Mass. — (1920), 127 N. E. 597, 6 W. C. L. J. 323; *Williams v. Blodgett Const. Co.*, — La. —, (1920), 84 So. 115, 6 W. C. L. J. 53; *Hyett v. N. W. Hospital for Women & Children*, — Minn. —, (1920), 180 N. W. 552, 7 W. C. L. J. 337.

matter involved is different. In the one case the statute provides a definite sum to each dependent, based upon the actual or constructive earning power of the decedent at the time of the accident, without reference to negligence, while in the other the jury are permitted only to give 'a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons for whose benefit the action is brought' (Code of Civil Procedure, Sec. 1904), and the amount is to be distributed as though it constituted a part of an unbequeathed estate (Code of Civil Procedure, Sec. 1903). We are of the opinion that the election of an administratrix cannot be a bar to a claim on behalf of the individuals who are given definite rights under the statute, and that the award should not be disturbed."¹⁴

It is held under the Oklahoma Act that an award of compensation on account of an injury which later resulted in death does not preclude an action for damages by the personal representative on account of such death.¹⁵ The Utah Act was amended in this respect in 1921 to make compensation the exclusive remedy.

§ 10. Election, When Exempted by Having Less Than Stated Number of Employees.—Many of the Compensation Acts provide that they shall apply only to employers and the employees of employers having a stated number or more employees. This number ranges from three in some states to sixteen in Alabama.¹⁶ Most of these acts also provide a specific method by which such exempted employers and employees may elect to come under the act, which method is usually the same as that provided for election to come under the act, where election is not presumed, i. e. notice by the employer and employees to each other and to the commission or board. After such exempted employer has elected to come under the act and his employees have also complied with the act in so far as it is required of them the em-

14. *In re Balias*, 189 App. Div. 408, 178 N. Y. Supp. 519, 5 W. C. L. J. 114.

15. *Lahoma Oil Co. v. Indus. Comm.*, — Okla. —, 175 Pac. 836.

16. Alabama 11, Alaska 5, Connecticut 5, Delaware 5, Kansas 5, Kentucky 5, Maine 6, Missouri 5, New Hampshire 5, New Mexico 5, Ohio 5, Oklahoma 3, Porto Rico 5, Texas 3, Tennessee 10, Vermont 11, Virginia 11, Wisconsin 3, Wyoming 3.

ployer is then bound by the act the same as if he had not been exempted.¹⁷

There appears to be little justification for these numerical exemptions. They seem to have been prompted originally by legislative expediency in order to insure the passage of the act and thus establish the compensation principle in the respective states. They introduce complications into the administration of the acts, in that it is often difficult to determine when the employer has the required number of employees, "regularly employed," that would require him to comply with the provisions of the act and the employee is for the same reason uncertain whether or not he is entitled to the benefits of the act.

It has been held by the supreme court of the United States that these exemptions do not constitute such arbitrary discriminations as make the acts unconstitutional.¹⁸

§ 11. **Election by Farmers, Employers of Domestic Servants, Casual Employees and Outworkers.**—These employments are excepted from almost all the American Compensation Acts.¹⁹ Some of the Acts provide methods whereby these employments may be brought under the act when both employer and employees so desire but the employers do not suffer the penalty of being deprived of their common law defenses if they do not elect to come under the act.²⁰

17. *McMillan v. Ellis*, — Kan. —, 192 Pac. 744, (1920), 6 W. C. L. J. 679.

18. *Jeffery Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. Ed. 364, 7 N. C. C. A. 570.

19. Agriculture expressly or impliedly exempted from all acts except New Jersey and Hawaii. Domestic servants exempted from all acts except New Jersey.

20. *Shafer v. Parke Davis & Co.*, Mich. Wk. Comp. Cases (1916), 7, 192 Mich. 577, 150 N. W. 304; *Texas Refining Co. v. Alexander*, — Tex. Civ. App. —, 202 S. W. 131, 17 N. C. C. A. 535; *Uphoff v. Ind. Bd. of Ill.*, 111 N. E. 128, 271 Ill. 312; *Wangler Boiler & Sheet Metal Works v. Indus. Comm.*, — Ill. —, 122 N. E. 366, 3 W. C. L. J. 617; *Slycord v. Horn*, — Iowa —, 162 N. W. 249, 41 W. C. L. J. 589; *Miller v. United Fuel Gas Co.*, — W. Va. —, (1921), 106 Atl. 419; Wis., 1921. § 2394-7.

Chief Justice Rugg of the Supreme Court of Massachusetts in construing this provision of the Massachusetts Act said: "The Workmen's Compensation Act was not intended to confer its advantages upon farm laborers, or to impose its burdens upon farmers. St. 1911, c. 751, pt. 1, art. 2. The legislative policy of exempting them from statutory benefits and liabilities established in addition to those of the common law disclosed in the Employer's liability Act, St. 1909, c. 514, art. 142, has been continued in the Workmen's Compensation Act. A farmer employing laborers in agriculture suffers no harm in not undertaking to become a subscriber under the Workmen's Compensation Act. Hence, it is apparent that a farmer who chooses to avail himself of its terms and thereby to confer the boon of its protection upon his employees, does so on other grounds than those which might actuate the manufacturer or other employers of labor. * * * The act is a practical measure designed for use among a practical people. There appears to be no reason for saying that a farmer may not adopt it if he desires. Any contract of insurance made by him under its terms is valid and enforceable. On the other hand, if he does not desire to make it available, for all of his employees, there is no insuperable objection to his undertaking an insurance for a limited portion of them. If there are those, separable from others by classification and definition, whose labor is more exposed or dangerous or whom he may desire to protect for any other reason, there is nothing in the act reasonably interpreted to show why he may not do so. * * * The exemption applies to all farmers so far as concerns farming operations whether carrying on other business or not." ²¹

These provisions of compensation acts which thus except or exempt certain employments from the operation of the act are not in violation of the "equal protection of the laws" provision of the Federal Constitution.²²

21. *Keaney v. Tappen et al.*, 217 Mass. 5, 104 N. E. 438, 4 N. C. C. A. 556; *Seggebrush v. Indus. Comm.*, 288 Ill. 163, (1919), 123, N. E. 276, 4 W. C. L. J. 156.

22. *New York Central Ry. Co. v. White*, 243 U. S. 188, 61 L. Ed. 667, 37 Sup. Ct. Rep. 247, 13 N. C. C. A. 943.

§ 12. **Election as to Part Only of Employees.**—It is a pertinent question under elective and partially elective compensation acts whether the employer has the right to accept the act as to a part of his employees and reject it as to the remainder. Can an employer accept the act as to his factory employees and reject it as to his traveling salesmen, or clerical help? It has been urged that since each individual employee has the right to say whether he will be bound by his employer's election of the law that therefore the employer should have an equal right to make this discrimination as to his employees. Some of the acts, such as, for example, New York, cover only certain specifically named employments, or as in the case quoted from in the previous section, where the employer has two or more classes of employees, one of which is not covered by the act, he may elect to come under the act as to those classes that are not exempted from the act, but would not be bound to pay compensation as to the exempted class unless he also especially elected as to that class.²³ It is however a different case to discriminate between classes of employees who are presumed to come under the act unless they or their employer rejects it. If the employer accepts the act it is generally held that he accepts for all of his employees connected with the business covered by the act, whether such employees be factory workers, traveling salesmen, clerical help, or what not.²⁴ In Michigan it is held otherwise.²⁵ Though it has been held in Michigan that where a chemical company also conducts a farm as an incident to its business and accepts the act generally its farm employees are not thereby brought under the act.²⁶ Farm hands of an Illinois employer are not covered by

23. *Shafer v. Parke, etc.*, 192 Mich. 577, 150 N. W. 304; *Keaney v. Tappan*, 217 Mass. 5, 104 N. E. 438, 4 N. C. C. A. 556.

24. *Garls v. Pekin Cooperage Co.*, Ill. Ind. B'd. No. 561, Oct. 5, 1914, 11 N. C. C. A. 322; *In re Cox*, 225 Mass. 220, 114 N. E. 281.

25. *Anderson v. McVannel*, 202 Mich. 29, 167 N. W. 860, 2 W. C. L. J. 285, 17 N. C. C. A. 467; *Kauri v. Messner*, 198 Mich. 126, 164 N. W. 537, 17 N. C. C. A. 466; *Bayer, v. Bayer*, 191 Mich. 423, 158 N. W. 109, 17 N. C. C. A. 467.

26. *Shafer v. Park, Davis & Co.*, 192 Mich. 577, 150 N. W. 304, 14 N. C. C. A. 1079.

the act merely because the employer also conducts an extra-hazardous business.²⁷

§ 13. **Election to Reject and Abolition of Common Law Defenses.**—Unless the negligence of the servant was wilful²⁸ many of the acts which are elective in form deprive the employer of the three common law defenses of negligence of fellow servant, assumed risk and contributory negligence, in actions for damages when he has expressly or through default²⁹ rejected the

27. *Vaughn's Seed Store v. Simonini*, 275 Ill. 477, 114 N. E. 163, 14 N. C. C. A. 1075.

28. *Smith v. Hyne*, — Mich. —, (Dec. 1919) 175 N. W. 293, 5 W. C. L. J. 407; *Lydman v. De Haas*, 185 Mich. 128, 151 N. W. 718, 8 N. C. C. A. 649.

29. *National Enameling & Stamping Co. v. Padgett*, 163 C. C. A. 280, 251 Fed. 30, 17 N. C. C. A. 517; *Crucible Steel Forge Co. v. Moir*, 219 F. 151, 135 C. C. A. 49; *Price v. Clover Leaf Coal Mining Co.*, 188 Ill. App. 27; *Boldt v. American Bottle Co.*, 208 Ill. App. 256, 17 N. C. C. A. 516; *Strom v. Postal Tel. Cable Co.*, 200 Ill. App. 431; *Lydman v. De Haas*, 185 Mich. 128, 151 N. W. 718, 8 N. C. C. A. 649; *Wulff v. Bossler*, 199 Mich. 70, 165 N. W. 1048, 17 N. C. C. A. 516; *Hughes v. Warman Steel Casting Co.*, 174 Cal. 556, 163 Pac. 885; *Mitchell v. Swanwood Coal Co.*, 182 Ia. 1001, 166 N. W. 391, 1 W. C. L. J. 603; *Bednar v. Mt. Olive etc. Coal Co.*, 197 Ill. App. 251; *Bell v. Toluca Coal Co.*, 272 Ill. 576, 112 N. E. 311; *Von Boeckmann v. Corn Products Refn. Co.*, 274 Ill. 605, 113 N. E. 902; *Gayton v. Borsofsky*, 230 Mass. 369, 119 N. E. 831, 17 N. C. C. A. 517; *Bernabeo v. Kaulback*, 226 Mass. 128, 115 N. E. 279; *Lizotte v. Nashua Mfg. Co.*, 78 N. H. 354, 100 Atl. 757; *Watts v. Ohio Valley Elect. R. Co.*, 78 W. Va., 144, 88 S. E. 659; *Nadeau v. Caribou Water, Light and Power Co.*, 118 Me. 325 (1919), 108 Atl. 190, 5 W. C. L. J. 238; *Ayshire Coal Co. v. West*, — Ind. App. —, (1919) 125 N. E. 84, 5 W. C. L. J. 216; *Lamberg v. Central Consumers Co.*, 184 Ky. 284, (1919), 211 S. W. 746, 4 W. C. L. J. 196; *West Kentucky Coal Co. v. Smithers*, 184 Ky. 211 (1919), 211 S. W. 580, 4 W. C. L. J. 198; *New Staunton Coal Co. v. Promm*, 286 Ill. 254 (1919), 121 N. E. 594, 3 W. C. L. J. 432; *Smith v. White*, — La. —, (1920), 83 So. 584, 5 W. C. L. J. 531; *Brown et al. v. Bristol Last Block Co.*, — Vt., —, (1920) 108 Atl. 922; *Long v. Foley*, 82 W. Va. 502, 96 S. E. 794, 17 N. C. C. A. 514; *Noe v. Shoal Creek Coal Co.*, 207 App. Div. 615; 17 N. C. C. A. 514; *Smith v. Stover Mfg. Co.*, 205 Ill. App. 169; *Synkus v. Big Muddy Coal and Iron Co.*, 190 Ill. App. 602, 17 N. C. C. A. 514; *Boldt v. American Bottle Co.*, 208 Ill. App. 578, 17 N. C. C. A. 516; *Spiehs v. Insull*, 207 Ill. App. 256. *Strom v. Postal Tel. Cable Co.*, 200 Ill. App. 431, 17 N. C. C. A. 517; *Wulff v. Bossler*, 199 Mich. 70, 165 N. W.

act.³⁰ Under some acts contributory negligence may be shown not as a defense³¹ but in diminution of damages.³² The employer is not deprived of the common law defenses in an action for damages if he has elected to come under the act and the plaintiff employee has rejected it.³³ Practically all compensation acts provide that the employer is deprived of these defenses in any proceeding against him for compensation under the act. These provisions are common to practically every elective compensation act, they being intended in the nature of a penalty to induce both employers and employees to elect to come under the act, the compulsory form of act having been avoided by many states, because of the fear of

1048; 17 N. C. C. A. 517; *Gayton v. Borsosky*, 230 Mass. 369, 119 N. E. 831; 17 N. C. C. A. 517; *Hodges v. Swastika Oil Co.*, — Tex. Civ. App. —, 185 S. W. 369, 17 N. C. C. A. 519; *Daly v. New Staunton Coal Co.*, 280 Ill. 175, 117 N. E. 413, 17 N. C. C. A. 524; *Kittier v. Chicago & W. I. R. Co.*, 203 Ill. App. 439, 17 N. C. C. A. 520; *Witchita Falls Motor Co. v. Meade*, — Tex. Civ. App. —, 203 S. W. 71, 17 N. C. C. A. 521; *Robbins v. Magoon & Kinball Co.*, 193 Mich. 200, 159 N. W. 323, 17 N. C. C. A. 521; *Henshaw v. Boston & M. R. R.*, 222 Mass. 459, 111 N. E. 172, 17 N. C. C. A. 523; *Gibson v. Kennedy Extension Gold Mining Co.*, 172 Cal. 294, 156 Pac. 56; 17 N. C. C. A. 525; *Stetson v. Mackinac Transportation Co.*, 182 Mich. 355, 148 N. W. 759, 8 N. C. C. A. 657; *Dooley v. Sullivan*, 218 Mass. 597, 8 N. C. C. A. 658; *Dietz v. Big Muddy Coal Co.*, 263 Ill. 480, 5 N. C. C. A. 419, 105 N. E. 289; *Foley v. Hines*, (1920) 111 Atl. 715, 7 W. C. L. J. 203; *West Ky. Coal Co. v. Smithers*, — Ky. App. —, 221 S. W. 558, 6 W. C. L. J. 177.

30. *Roberts v. United Fuel & Gas Co.*, — W. Va. —, (1919) 99 S. E. 549, 4 W. C. L. J. 461; *Talge Mahogany Co. v. Burrows*, — Ind. —, 130 N. E. 865.

31. *Western Coal and Mining Co. v. Indus. Comm.* — Ill. —, (1921), 129 N. E. 779; *Jackson Hill Coal & Coke Co. v. McDaniel*, — Ind. App. —, 131 N. E. 408.

32. *Hodges v. Swastika Oil Co.*, — Tex. Civ. App. —, 185 S. W. 369, 17 N. C. C. A. 523; *Bednar v. Mt. Olive & Staunton Coal Co.*, 197 Ill. App. 251, 17 N. C. C. A. 525; *Day v. Chicago M. & St. P. Ry. Co.*, 208 Ill. App. 351, 17 N. C. C. A. 533; *Lindblom v. Hazel Mill Co.*, 91 Wash. 333, 157 Pac. 998, 17 N. C. C. A. 533.

33. *Karney v. Northwestern Malleable Iron Co.*, 160 Wis. 316; 151; N. W. 786; *Wendzinski v. Madison Coal Corporation*, 282 Ill. 32, 118 N. E. 435; *Balken v. Cofax Consolidated Coal Co.*, 183 Ia. 1198, 168 N. W. 246, 17 N. C. C. A. 512; *Bjork v. U. S. Bobbin & Shuttle Co.* — N. H. —, (1920), 111 Atl. 284, 6 W. C. L. J. 707.

having it declared unconstitutional, as in the case of the early compulsory New York Act.

The abolition of the common law defenses, as provided in the compensation acts, has been universally approved by the courts as a proper legislative prerogative.³⁴ "To deprive an employer" (under an elective act) "of the right to assert those defenses is not an exercise of the police power, but is merely a declaration by the Legislature of the public policy of the State in that regard. The right of the Legislature to abolish these defenses cannot be seriously questioned. The rules of law relating to the defenses of contributory negligence, assumption of risk, and negligence of a fellow servant were established by the courts, and not by our

34. *Hawkins v. Bleakley*, 221 Fed. 378; *Hotel Bond Co.'s appeal*, 98 Conn. 143, 93 Atl. 245; *Havis v. Cudahy Ref. Co.*, 95 Kan. 505, 148 Pac. 626; *Wheeler v. Contoocook Mills Corp.*, 77 N. H. 551, 94 Atl. 265; *Sexton v. Newark Dist. Teleg. Co.*, 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, 1 N. C. C. A. 517; *Opinion of the Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *Matheson v. Minneapolis Street R. Co.*, 126 Minn. 286, 148 N. W. 71, 5 N. C. C. A. 871; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489, 3 N. C. C. A. 649; *De Francesco v. Piney Min. Co.*, W. Va., 86 S. E. 77; *State ex rel. Yaple v. Creamer*, 85 Ohio St., 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694, 1 N. C. C. A. 30; *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648, *Anderson v. Carnegie Steel Co.*, 255 Pa. 33, 99 Atl. 215; *Brost v. Whitall-Tatum Co.*, 89 N. J. L. 531 L. R. A. 1917D, 71; *De Constantine v. Piney Mining Co.*, 76 W. Va. 765; *Thornton v. Duffy*, 99 Ohio 120, 124 N. E. 54, 4 W. C. L. J. 548; *State ex rel. Amerland v. Hagan*, — N. D. —, (1919) 175 N. W. 372, 5 W. C. L. J. 446; *Superior & Pittsburg Copper Co. v. Davidovich*, 19 Ariz. 402, 171 Pac. 127, 16 N. C. C. A. 801; *Shade v. Ash Grove Lime and Portland Cement Co.*, 92 Kan. 146, 139 Pac. 1193, 5 N. C. C. A. 763; *State v. Clausen*, 65 Wash. 156, 3 N. C. C. A. 599, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *Stoll v. Pac. Steamship Co.*, 205 Fed. 169, 3 N. C. C. A. 606; *State v. Mountain Timber Co.*, 75 Wash. 581, 4 N. C. C. A. 811, 135 Pac. 645; *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554; 1 N. C. C. A. 720; *Mondou v. N. Y. N. H. & H. R. Co.*, 223 U. S. 1, 1 N. C. C. A. 875, 32 Sup. Ct. 169, 56 L. E. 327, 38 L. R. A. (N. S.) 44; *Scott v. Nashville Bridge Co.*, — Tenn. —, (1920), 223 S. W. 844, 6 W. C. L. J. 580; *Eassig v. State*, — Ohio —, 116 N. E. 104, B 1 W. C. L. J. 1458; *State ex rel. Turner v. Fidelity Guaranty Co.*, — Ohio —, 117 N. E. 232; *Adams v. Iten Biscuit Co.*, — Okla. —, 162 Pac. 938 B 1 W. C. L. J. 1480.

Constitution, and the Legislature may modify them or abolish them entirely, if it sees fit to do so.’³⁵ Nor does the abrogation of the common law defenses in the opinion of the U. S. Supreme Court, violate the “due process of law” amendment. In *Mondou v. N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, on page 50, 32 Sup. Ct. 169, on page 175, Mr. Justice Van Devanter, speaking for the court, said: “Of the objections to these changes, it is enough to observe: First, ‘A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property, which have been created by the common law cannot be taken without due process, but the law itself, as a rule of conduct, may be changed at the will * * * of the legislature, unless prevented by constitutional limitations. Indeed the great office of statutes is to remedy defects in the common law, as they are developed and to adapt it to the changes of time and circumstances.’” It has also been held that state legislatures “cannot be deemed guilty of arbitrary classifications in making one rule for larger and another for small establishments, as to these defenses.” In other words the fact that employers of more than five employees are deprived of their common law defenses, if they reject the act, and those having less than five employees are not so penalized,³⁶ which is also true of employers of casual em-

35. *Deibeikis v. Link Belt Co.*, 261, Ill. 454, 104 N. E. 211, 5 N. C. C. A. 401; *Bell v. Toluca Coal Co.*, 272 Ill. 576; 112 N. E. 311; *Wheeler v. Contoocook Mills Corp.*, 77 N. H. 551, 94 Atl. 265; *Sadowski v. Thomas Furnace Co.*, 157 Wis. 443, 146 N. W. 770; *Strem v. Postal Telegraph Cable Co.*, 271 Ill. 514, 111 N. E. 555; *Dooley v. Sullivan*, 218 Mass. 597, 106 N. E. 604; *Pope v. Haywood Bros. & W. Co.*, 221 Mass. 143, 108 N. E. 1059; *Cavanaugh v. Morton Salt Co.*, 152 Wis. 375; *Puza v. C. Hennecke Co.*, 158 Wis. 482, 149 N. W. 223; *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 90 Atl. 859; *Arizona Copper Co. Ltd. v. Hammer* — U. S. Sup. Ct. — (1919) 4 W. C. L. J. 321; *Crooks v. Tazewell Coal Co.*, — Ill. —, 105 N. E. 132, 5 N. C. C. A. 410; *State ex rel. Yaple v. Cramer*, 85 Ohio St. 349, 1 N. C. C. A. 30; *Sharp v. Sharp*, 213 Ill. 236; *People v. Binn's*, 191 Ill. 68; *City of Chicago v. Sturgis*, 222 U. S. 313.

36. *Hodges v. Swastika Oil Co.*, — Tex. Civ. App. —, 185 S. W. 369. Defenses available as against casual employees. *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328; *Fidelity & Casualty Co. of N. Y. v. Llewelyn Iron Works*, — Cal. App. —, 184 Pac. 402, 4 W. C. L. J. 694.

ployees,³⁷ and certain other excepted employments,³⁸ does not make this provision of the various compensation acts unconstitutional.³⁹ Neither do the different modes by which employer and employee may indicate their election constitute an unjust discrimination against either.⁴⁰

It is held in New Jersey that the doctrine of assumption of such risks as are virtually incident to the employment itself, cannot be attributed to a minor employed in violation of the law.⁴¹ It has been held by the Supreme Judicial Court of Massachusetts that an employer who had rejected the compensation act may defend a case on the theory of contractual assumption if risk, which is necessarily incident to the employment itself, even though such employment may be dangerous.⁴² This risk, it distinguishes from the assumption of risk that grows out of the negligence of the employer in reference to some matter outside the risks assumed under the employee's contract of employment, such as the failure

37. *American Steel Foundries v. Ind. Board*, 284 Ill. 99, 119 N. E. 902, 2 W. C. L. J. 463; *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328.

38. *Miller v. United Fuel Gas Co.*, — W. Va. —, (1921), 106 S. E. 419; *Page v. New York Realty Co.*, — Mont. —, (1921), 196 Pac. 871.

39. *Jeffery Mfg. Co. v. Blagg*, 235 U. S. 571, 59 Law Ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570, 209 Mass. 607; 96 N. E. 308, 1 N. C. C. A. 557; *Marshall Field & Co. v. Indus. Comm. of Ill.*, 285 Ill. 333, 120 N. E. 773, 3 W. C. L. J. 105; *Memphis Cotton Oil Co. v. Tolbert*, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547.

40. *Shea v. North Butte Mining Co.*, 55 Mont. 522 (1919), 179, Pac. 499, 3 W. C. L. J. 768.

41. *Lesko v. Liondale Bleach, Dye and Print Works*, — N. J. —, 107 Atl. 275, 4 W. C. L. J. 525.

42. *Ashton v. Boston & Maine R. R. Co.*, 222 Mass. 65; 109 N. E. 820, 12 N. C. C. A., 837. Discussed and criticised in *Bay State Ry. Co. v. Rust*, 3 W. C. L. J. 1; As to pleading this defense see *Murch v. Thomas Wilson's Sons Co.*, 168 Mass. 408; *Gleason v. Smith*, 172 Mass. 50; *Boston etc. Ry. v. Baker*, 150 C. C. A. 158, 236 Fed. 896; *A1 W. C. L. J.* 48; *Besnys v. Herman Zohrlant Leather Co.*, 157 Wis. 203, 147 N. W. 37, 5 N. C. C. A. 282; *Bernabeo v. Kaulback*, 226 Mass. 128, 115 N. E. 279, 17 N. C. C. A. 521; See, also, *Acklin Stamping Co. v. Kutz*, 98 Ohio St. 61, 120 N. E. 229, 17 N. C. C. A. 607; *Crosse v. Boston M. R. R.*, 223 Mass. 144, 111 N. E. 676, 17 N. C. C. A. 522; *International Cotton Mills Co. v. Pernod*, 244 Fed. 723 *A1 W. C. L. J.*, 51; *Louis v. Smith-McCormick Const. Co.*, — W. Va. —, 92 So. 249, *B 1 W. C. L. J.* 1637.

of the employer to furnish the employee with ordinarily safe and suitable tools and appliances. This latter form of assumption of risk, it was held, could not be set up by the employer as a defense.⁴³ This decision was affirmed in a later Massachusetts case, wherein the court stated that, while the Act takes away some of the defenses from an employer, who has rejected it, it does not transform conduct which was theretofore lawful on the part of the employer into negligence.⁴⁴ A like ruling has been made in West Virginia.⁴⁵ Nor is the employee entitled to recover from an employer who has rejected the act in the absence of the latter's negligence,⁴⁶ and the burden of proving it is on the employee.⁴⁷

43. *Zinn v. Cabot*, — W. Va. —, (1921), 106 S. E. 427; *Puza v. C. Hennecke Co.*, 158 Wis. 482, 149 N. W. 223; *Bay State St. R. Co. v. Rust* 253 Fed. 43, 3 W. C. L. J. 3; *Kieler v. Fred Miller Brewing Co.*, — Wis. —, 161 N. W. 739, B 1. W. C. L. J. 1683.

44. *Walsh v. Turner Center Dairying Ass'n*, 223 Mass. 386, 111 N. E. 889; *Mammoth v. Worcester Consol. St. Ry. Co.*, 228 Mass. 282, 117 N. E. 336, 1 W. C. L. J. 83. See *Contra*, *Mitchell v. Phillips Min. Co. (Inc.)* 165 N. W. 108, 1 W. C. L. J. 190; *Pope v. Heywood Bros. & Wakefield Co.*, 221 Mass. 143, 108 N. E. 1058, 17 N. C. C. A. 513; *West Kentucky Coal Co. v. Smithers*, — Ky. App. —, 211 S. W. 580, 4 W. C. L. J. 198.

45. *Louis v. Smith-McCormick Const. Co.*, 80 W. V. 159, 92 S. E. 249; *Antonio DeFrancesco v. Piney Mining Co.*, 76 W. Va. 756, 86 S. E. 777.

46. *Gerthung v. Stambough-Thompson Co.*, 1 Ohio App. 176; *Hunter v. Colfax Consol. Coal Co.*, 175 Ia. 275, 154 N. W. 1037 — Amended 157 N. W. 145, 11 N. C. C. A. 886; Ann. Cas. 1917E 803; *Linde-Bauer v. Weiner*, 94 Misc. Rep. 612, 159 N. Y. S. 987; *Watts Ohio Valley E. R. Co.*, 78 W. Va. 144, 88 S. E. 659; *Louis v. Smith-McCormick Const. Co. (W. Va.)* 92 S. E. 249; *Walsh v. Turner Center Dairying Ass'n*, 223 Mass. 386, 111 N. E. 889; *Strom v. Postal Tel. Cable Co.*, 200 Ill. App. 431; *Salus v. Great Northern R. Co.*, 157 Wis. 546, 147 N. W. 1070; *Price v. Cloverleaf Mining Co.*, 188 Ill. App. 27, 17 N. C. C. A. 519; *Spivok v. Indep. Sash and Door Co.*, 173 Cal. 438, 160 Pac. 565, 17 N. C. C. A. 519; *Pope v. Heywood Bros. & Wakefield Co.*, 221 Mass. 143, 108 N. E. 1058, 17 N. C. C. A. 521; *Lydman v. De Haas*, 185 Mich. 128, 151 N. W. 718, 8 N. C. C. A. 649; *Wilkin v. Koppers Co.*, — W. Va. —, (1919), 100 S. E. 300, 4 W. C. L. J. 755; *Stornelli v. Duluth S. S. & Ry. Co.*, — Mich. —, 160 N. W. 415; A 1 W. C. L. J. 1023; *Miller v. United Fuel Gas Co.*, — W. Va. —, (1921), 106 S. E. 419—; *Zinn v. Cabot*, — W. Va. —, (1921), 106 S. E. 427.

47. *Stornelli v. Duluth, etc. R. Co.*, 193 Mich. 674, 160 N. W. 415; See

Though it is held in other jurisdictions that there is a presumption of negligence on the part of the employer and the burden of rebutting this presumption rests upon him.⁴⁸ When the employee rejects the act, he is not entitled to recover when the injury is due to his own negligence,⁴⁹ but when he does recover he is not limited to the rate of compensation fixed by the act,⁵⁰ though he is so limited in some states.⁵¹

In construing the Louisiana Act the Supreme Court of that state said: "Section 28 of Act No. 20 of 1914, which reads, 'That no compensation shall be allowed for an injury caused * * * (3) by the injured employee's deliberate failure to use an adequate guard or protection against accident, provided for him,' finds no application in a case where no guard or protection has been provided against a danger, the assumption of the risk of which has caused the accident, and where such risk has been assumed, not deliberately, but under conditions which rendered it necessary for the employee to decide instantaneously as between two courses, either of which, so far as he was informed, he was free to choose, the more efficiently, as he conceived to perform his duty to his employer.'" ⁵²

Hunter v. Colfax Consol. Coal Co., 175 Ia. 245, 154 N. W. 1037 (placing burden of proof on employer); *Wendzinski v. Madison Coal Corp.* 282 Ill. 32, 118 N. E. 435, 17 N. C. C. A. 517; *Price v. Cloverleaf Coal Mining Co.*, 188 Ill. App. 27, 17 N. C. C. A. 526; *Smith v. Stover Mfg. Co.*, 205 Ill. App. 169, 17 N. C. C. A. 526; *Yeancy v. Taylor Coal Co.*, 199 Ill. App. 14, 17 N. C. C. A. 526; *Thorne v. F. C. Johnson Co.* — Me. —, 111 Atl. 410, 1920, 7 W. C. L. J. 684.

48. *Mitchell v. Phillips Mining Co.* 181 Iowa 600, 165 N. W. 108, 17 N. C. C. A. 529; *Mitchell v. Des Moines Coal Co.*, 182 Iowa 1072, 165 N. W. 113, 17 N. C. C. A. 531; *Gay v. Hocking Coal Co.* 184 Iowa 949, 169 N. W. 360, 17 N. C. C. A. 531; *O'Brien v. Las Vegas & T. R. Co.*, 155 C. C. A. 438, 242 Fed. 850, 17 N. C. C. A. 532.

49. *Watts v. Ohio Valley Elect. R. Co.* 78 W. Va. 144, 88 S. E. 659.

50. *Dick v. Knoperbaum* (App. Div.), 157 N. Y. S. 754.

51. *Mahowald v. Thompson-Starrett Co.*, 134 Minn. 113, 158 N. W. 913, But see *Hode v. Simmons*, 132 Minn. 344, 157 N. W. 506.

52. *Farris v. Louisiana Long Leaf Lumber Co.*, — La. —, (1920), 86 So. 670, 7 W. C. L. J. 292.

§ 14. **Election by Minors and Minors Generally.**—Section 7 of the Missouri Act contains the following typical provision: "The word employee shall also include all minor employees, and all such minor employees are hereby made of full age for all purposes under, in connection with or arising out of this act." By this wording the legislature has apparently expressed the intention to abolish the distinction between minors and persons of full age, so far as the Compensation Act is concerned, whether it be as to matters of election or rejection of the act or settlements under its provisions. The legislature has the power for this purpose to declare minors of full age.⁵³

"The appellants also contend that because Fuller was a minor when the accident occurred he was not bound by the provisions of the law making the statute applicable to employees who filed no notice of an election to the contrary. Kan. Gen. Stat. 1915, Sec. 5939; Laws 1917, c. 226 Section 24. The argument is that the matter is contractual and that a minor is not bound by his contracts. The Compensation Act by various references to minor workmen fairly shows an intention to bring them within its provisions. It is competent for the Legislature to place upon minors the obligation of an affirmative election not to come within the Compensation Act in order not to be subject to its provisions (Young v. Sterling Leather Works, 91 N. J. L. 289, 102 Atl. 395), and this it appears to have done."⁵⁴

For the purpose of electing the acts, a number of states make minor employees, of legal working age, *sui juris*.⁵⁵ Other acts require the employer to deal with the minor and the latter with the employer, through the parents or guardian. "The act provides for no suit by a parent for compensation *per quod*; and we held at the last term that the parent could not recover at common

53. *Dickens v. Carr*, 84 Mo. 658; *Herkey v. Agar Mfg. Co.*, 90 Misc. 457, 153 N. Y. Supp. 369; *Green v. Caldwell*, 170 Ky. 571, 180 S. W. 648.

54. *Chicago R. R. & P. Ry. Co. v. Fuller*, 105 Kan. 608, (1919), 186 Pac. 127; *Scott v. Nashville Bridge Co.*, — Tenn. —, (1920), 223 S. W. 844, 6 W. C. L. J. 580.

55. California, Colorado, Illinois, Maryland, Michigan, Minnesota, Nebraska, Kentucky, Ohio, Oregon, Rhode Island, Washington. The Alabama Act specifically states that it applies to minors even though employed contrary to laws regulating minors.

law. *Buonfiglio v. R. Neuman & Co.*, 107 Atl. 285. The result is that the parent is barred entirely of recovery per quod unless he or she takes the statutory method of rejecting the elective compensation scheme, or receives notice from the employer, as in *Brost v. Whitall-Tatum Co.*, 89 N. J. Law, 531, 99 Atl. 315, L. R. A. 1917 D, 71, a suit at common Law by the employee. Whether or not the contract of employment is made, or contemplated by the statute as made by the infant herself, or as agent for the parent, or directly by the parent, is quite immaterial. If there is a valid employment of an infant over 14 years (see *Hetzel v. Wasson Piston Ring Co.*, 89 N. J. Law, 201, 98 Atl. 306, L. R. A. 1917D, 75), and no agreement or notice to make section 2 inoperative, then in case of injury the whole theory of the act is that the compensation shall be paid to, and sued for by, the employee, or dependents, or beneficiaries. These are the words of the statute itself. Nowhere therein is a parent, qua parent, recognized as entitled to any of the prescribed compensation. Such being the case, the alleged injustice of confining the infant employee to recovery under the act disappears."⁵⁶

"The right of an infant to maintain an action for injuries received, for which the master may be liable, is subject to statutory regulation, and this statute clearly provides that any employee, which includes infants, may maintain an action under section 2, unless notice be given to the employer by the parent or guardian that any right of action that may arise, based upon injuries suffered in that service, is not limited to the compensation provided in the statute."⁵⁷

The New Jersey Act is presumed to apply to the employment of minors unless a notice of the election to reject the act has been given to the parents of the minor.⁵⁸

56. *Hartman v. Unexcelled Mfg. Co.*, 93 N. J. L. 418, (1919), 108 Atl. 357, 5 W. C. L. J. 422; *Buonfiglio v. Neumann & Co.* 107 Atl. 285, 4 W. C. L. J. 521.

57. *Hoey v. Superior Laundry Co.*, 85 N. J. L. 119, 88 Atl. 823, 15 N. C. C. A. 721.

58. *Troth v. Millville Bottle Works*, 89 N. J. L. 219, 98 Atl. 435, 15 N. C. C. A. 722, Aff'g 86 N. J. L. 558, 9 N. C. C. A. 855, 91 Atl. 1031; *Brost v. Whitall-Tatum Co.*, 89 N. J. L. 531, L. R. A. 1917D, 71, 99 Atl. 315, 15 N. C. C. A. 723.

It has been held in some jurisdictions that the act does not apply to minors employed in violation of the law, requiring them to be of the legal working age fixed by the general statutes of the state for the reason that they cannot then be considered legally employees.⁵⁹ And the payments of premiums into the state Compensation fund is no protection against such unlawful employment.⁶⁰

It has also been held by one of the New York appellate court divisions that the Workmen's Compensation Act is not a bar to a common-law action for damages by an infant employed in violation of the New York Penal Law, section 1275, and the Labor Law section 81, requiring machinery to be properly guarded.⁶¹

So it is held under the Iowa Act that the illegal employment of a girl under 14 years of age will not limit the employer's liability to compensation fixed by the compensation act to which the

59. *Pettee v. Noyes*, 133 Minn. 109, 157 N. W. 995; *Westerlund v. Kettle River Co.*, 137 Minn. 24, 162 N. W. 684; *Stetz v. Mayer Boot & Shoe Co.*, 163 Wis. 151, 156 N. W. 971, 15 N. C. C. A. 730; *Hetzel v. Wasson Piston Ring Co.*, 89 N. J. L. 201, 98 Atl. 306, L. R. A. 1917D, 75; *Moll v. Industrial Comm. et al. (Ill.)* (1919), 123 N. E. 562, 4 W. C. L. J. 369; *Messmer v. Industrial Board*, 282 Ill. 562, 118 N. E. 993, 1 W. C. L. J. 956; *Roszek v. Bauerle & Stark Co.*, 282 Ill. 557, 118 N. E. 991, 1 W. C. L. J. 952; *Lostuttur v. Brown Shoe Co.*, 203 Ill. App. 518; *Kruczkowski v. Polonia Pub. Co. (Mich.)*, 168 N. W. 932, 2 W. C. L. J. 913; *Acklin Stamping Co. v. Kutz (Ohio)* 120 N. E. 229, 2 W. C. L. J. 833; *Hillstead v. Ind. Ins. Comm.*, 80 Wash. 426, 141 Pac. 913, Ann. Cas. 1916B, 789; *Secklich v. Harris Emery Co.*, — Ia. —, 169 N. W. 325, 3 W. C. L. J. 126; *Adkins v. Hope*; *Waterman Lumber Co. v. Beatty*, — Tex. Civ. App. —, 204 S. W. 448, 2 W. C. L. J. 706; *New Albany Box & Basket Co. v. Davidson*, — Ind. —, (1920), 125 N. E. 904, 5 W. C. L. J. 509; *Lesko v. Liondale Bleach Dye & Print Works*, 93 N. J. L. 4, (1919), 107 Atl. 275, 4 W. C. L. J. 525; *Freys Guardian v. Gamble Bros.* — Ky. App. — (1920) 221 S. W. 870, 6 W. C. L. J. 171; *Lincoln v. National Tube Co.*, — Pa. —, (1920), 112 Atl. 73; *Mangus v. Proctor Eagle Coal Co.*, — W. Va. —, (1920), 105 S. E. 903; *Galloway v. Lbrmen's Indem. Exchange*, — Tex. Civ. App. —, (1921), 221 S. W. 536.

60. *Morrison v. Smith Pocohontas Coal Co.*, — W. Va. —, (1921), 106 S. E. 448.

61. *Wolff v. Fulton Bag & Cotton Mills*, — N. Y. App. —, 173 N. Y. Supp. 75, 3 W. C. L. J. 354.

child was incapable of giving consent and the misstatement of the girl as to her age is immaterial since the prohibition against such employment is absolute.⁶²

It has also been held that illegality of the employment is no defense to a claim for compensation under the act, even though the employee be not of legal working age or if he be of that age but engaged in employment prohibited to minors.⁶³ "Section 2447, Rem. Code, hereinbefore quoted, makes it a misdemeanor for an employer to employ 'any male child under the age of fourteen years or any female child under the age of sixteen years at any labor' in any factory without the written permit of a judge of a superior court of the county wherein such child may live. This statute does not make it unlawful for a child under the prohibited age to work and imposes no penalty upon the child when it does work. It follows that the child neither gains nor loses any rights by such employment, even though the employer may be penalized. This section plainly recognizes that a child less than the maximum age for the employment of a minor is a workman within the meaning of that act. It follows that whether the child is employed either lawfully or unlawfully such child is entitled to all the privileges of the Workingmen's Compensation Act and must seek its remedies under the terms of that act." ⁶⁴

The courts of Wisconsin make a distinction as to these two classes of violation of the general statute laws in view of the pro-

62. *Secklich v. Harris Emery Co.*, — Iowa —, 169 N. W. 325, 3 W. C. L. J. 126; same parties, 160 N. W. 327, 17 N. C. C. A. 611. In *re Stoner* — Ind. —, (1921), 128 N. E. 938, 7 W. C. L. J. 198; *Maryland Cas. Co. v. Indus. Comm.*, — Cal. —, 178 Pac. 858, 3 W. C. L. J. 563.

63. *Uhl v. Hartwood Club*, 177 App. Div. 41, 163 N. Y. S. 764, affirmed 221 N. Y. 588, 116 N. E. 1000; *Stanton v. Masterson*, 2 Cal. I. A. C. Dec. 707; See *Waterman Lumber Co. v. Beatty* (Civ. App.) 204 S. W. 448, 2 W. C. L. J. 706; *Robilotto v. Bartholdi Realty Co.*, 171 N. Y. Supp. 328, 3 W. C. L. J. 59; *Ide v. Fuel & Timmins*, 179 N. Y. App. Div. 567, 15 N. C. C. A. 731, 166 N. Y. S. 858; But see to the contrary *Wolff v. Fulton Bag & Cotton Mills* 185 N. Y. App. Div. 436, 173 N. Y. 375, 17 N. C. C. A. 618, 3 W. C. L. J. 354.

64. *Rasi v. Howard Mfg. Co.*, — Wash. —, (1920), 187 Pac. 327, 5 W. C. L. J. 632.

vision in its compensation act making it applicable to minors, "who are legally permitted to work under the laws of this State," holding that minor employees under the legal age are not employees within the meaning of the act, but that minor employees in prohibited employments are employees within the meaning of the act.⁶⁵ Though in 1917 the Wisconsin Act was amended to give the minor treble compensation in either case.

There must be proof of contractual relation and no rejection before a minor employee can be regarded as being under the Compensation Act,⁶⁶ though it has been held to be immaterial that the contract is voidable,⁶⁷ or that the employee misrepresented his age.⁶⁸

Where an employer has a certificate of age issued from a school committee, and complying in all respects with the statutory provisions in this regard, he is not obliged to investigate the accuracy of the certificate and is entitled to rely upon it as rendering the employment of the child legal, and the child is *sui juris* as an employee.⁶⁹

It has been held that a minor's misrepresentation as to his age may work to his detriment. As in a common-law action for

65. *Lutz v. Wilmanns Bros. Co.*, 166 Wis. 210, 164 N. W. 1002, 15 N. C. C. A. 731; *Foth v. Macomber & Whyte Rope Co.*, 161 Wis. 549, 154 N. W. 369; *Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1 Ann. Cas. 1915B, 847; *Menominee Bay Shore Lumber Co. v. Ind. Comm.*, 162, Wis. 151, 156 N. W. 151; *Rhodes v. J. B. B. Coal Co.* 79 W. Va. 71, 90 S. E. 796.

66. *Hillestad v. Industrial Ins. Comm.*, 80 Wash. 426, 141 Pac. 913, Ann. Cas. 1916B, 789, rejection, *Brost v. Whittall-Tatum Co.*, 99 Atl. 315; *Adkins v. Hope Engineering Co.*, 81 W. Va. 449, 94 S. E. 506, 15 N. C. C. A. 724.

67. *Hoey v. Superior Laundry Co.*, 85 N. J. L. —, 88 Atl. 823, 1919; *Young v. Sterling Leather Works*, 91 N. J. L. 289.

68. *Havey v. Erie R. Co.*, 87 N. J. L. 444, 88 N. J. L. 684; *Sturgis & Burn Mfg. Co. v. Beauchamps*, 34 Sup. Ct. Reporter 60 (Dec. 1, 1913); *Secklich v. Harris-Emery Co.*, 184 Ia. 1025, 169 N. W. 325, 3 W. C. L. J. 126; But see *Norfolk & W. Ry. Co., v. Mondurant's Admr.*, 59 S. E. 1091; 107 Va. 515, 15 L. R. A. (N. S.) 443n; *Stetz v. Mayor Boot & Shoe Co.*, 163 Wis. 151, 156 N. W. 971, 15 N. C. C. A. 729.

69. *Taglinete v. Sydney Worsted Co.*,—R. I.—(1919) 105 Atl. 641, 3 W. C. L. J. 662. Oregon Act amended 1921. § 6627.

damages sustained by a minor, who was illegally employed the defense of contributory negligence is open to the employer when he can show by a preponderance of the evidence that there was fraud or misrepresentation as to his age on the part of the minor employee.⁷⁰

“Does the Act in question comprehend employees over 14, though under 21 years of age, when lawfully employed in mines? Unless invalid we answer unhesitatingly that it does comprehend and cover infant employees lawfully employed. Certainly they are not by the terms of the statute excluded from its provisions. The statute was enacted for the benefit both of employers and employees. To say that the act does not cover the employment of infants would be to deprive them of very material benefits, and of the compensation fund created by the act. If brought under the act, they are protected against their contributory negligence, the negligence of fellow-servants, and the defense of assumption of risk, and the burden of doubtful and expensive litigation required before the statute would be removed. Disability of infancy being created by statute may certainly be removed by statute. A statute which makes it lawful to employ an infant over 14 years of age in a coal mine should certainly receive a construction that will authorize him to make a lawful contract of employment, to bind himself thereby, and to participate in all the benefits which would accrue to him, under a statute made for the protection of employees.”⁷¹

In construing the Massachusetts Act as it relates to minors the Supreme Judicial Court of Massachusetts said:

“The definition does not in terms exclude minors, but on the contrary includes ‘every person in the service of another under any contract of hire,’ with the exception of certain persons specifically described. Children and minors are expressly recognized in the act—in part, 2, Sec. 7, cl. C, as amended by St. 1914, c.

70. *Acklin Stamping Co. v. Kutz*, 78 Ohio St. 61, 120 N. E. 229, 17 N. C. C. A. 607.

71. *Rhodes v. J. B. B. Coal Co.*, 79 W. Va. 71, 90 S. E. 796, 15 N. C. C. A. 720; *Radtke Bros. et al. v. Indus. Comm.*, — Wis. —, 183 N. W. 168, (1921).

708, Sec. 3. Under part 2, Sec. 22, as amended by St. 1914, C. 708, Sec. 8, the Industrial Accident Board is authorized in its discretion to provide for the payment of a lump sum to a minor who has received permanently disabling injuries. See also St. 1915, c. 236. If a minor is not within the terms of the act and therefore not bound by them, it would follow that the insurer would be relieved from making payments thereunder to a minor employee if the contract of hire was made before he became of full age. To reach such a conclusion would result in great hardship. It would not be in accord with the language of the act or in harmony with its humanitarian purposes which were to cure the defects of previously existing remedies and to provide adequate and just protection to employees against injuries, and relief in case of accidents."⁷²

Under the California Act "it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury." Thus, where a minor's contract of employment included both prohibited employment as well as legal employment and he was killed while performing that portion of his labors which was not prohibited it was held that the employer was not precluded from pleading contributory negligence.⁷³

Under the Massachusetts act a parent's right of action for injuries to a minor child is not affected, although the child has accepted the act and received compensation thereunder for his injuries.⁷⁴

It has also been held that the fact that a minor was legally employed, but afterwards placed at forbidden work by a vice principal, would not bar him from his common law rights.⁷⁵

72. *Gilbert v. Wire Goods Co.*, (1919) 233 Mass. 570, 124 N. E. 479, 4 W. C. L. J. 714.

73. *Williams v. Southern Pac. R. Co.*, 173 Cal. 525, 160 Pac. 660, 15 N. C. C. A. 733.

74. *King v. Viscoloid Co.*, 219 Mass. 420, 106 N. E. 988, 7 N. C. C. A. 254.

75. *Gutmann v. Anderson*, 142 Minn. 141, (1919), 171 N. W. 303, 3 W. C. L. J. 765; *Kruczkowski v. Polonia Pub. Co.*, 203 Mich. 213, 168 N. W. 932, 17 N. C. C. A. 611.

In a California case the court said: "If the employee was a minor under the terms of the Workmen's Compensation Act, at the time of the first application and hearing, since she was not represented therein by a guardian, she had the right, incident to minority, of disaffirming the award of the commission rendered in such proceeding within a reasonable time after reaching the age of majority."⁷⁶

Under the Kentucky statute the failure of an employer to furnish safety devices required by statute does not entitle a guardian or the injured minor employee to sue at common law, for damages for this election applies only where the minor is employed in willful and known violation of law, and such failure does not constitute employment in violation of law.⁷⁷

Where a minor employed in violation of the law involuntarily appears before the Kentucky Compensation Board he is not thereby estopped from the prosecution of his common law action for damages.⁷⁸

Under the Indiana Act when an employer fails to secure an affidavit of age, as in the case of a 'young person,' that is a person between the ages of 14 and 18 years, such person is held not lawfully employel and therefore not an employee entitled to the benefits of the act.⁷⁹

In a California case where a minor was employed without an age and schooling certificate required by the child labor law, the court said: "On the whole, therefore, the contract of employment, in violation of the child labor law was illegal and not included in the policy of insurance (Mt. Vernon Co. v. Frankfort Co., 111 Md. 561, 75 Atl. 105, 134 Am. St. Rep. 636), and, there being no waiver or estoppel, the petitioner is not liable under the policy for the accident in question."⁸⁰

76. *Gounillou v. Indus. A. C. of Cal.*, — Cal. —, 193 Pac. 937.

77. *Freys Guardian v. Gamble Bros.*, — Ky. App. —, (1920), 221 S. W. 870, 6 W. C. L. J. 171

78. *Louisville Woolen Mills v. Kindgen*, — Ky. App. —, 231 S. W. 202.

79. *In re Stoner*, — Ind. App. —, (1920), 128 N. E. 938, 7 W. C. L. J. 198.

80. *Maryland Cas Co. v. Indus. Comm.*, — Cal. —, 178 Pac. 858, 3 W. C. L. J. 563

A minor child working for his father is not an employee within the meaning of the California Act, where there has not been an actual emancipation of the child.⁸¹

§ 15. **Election to reject and action for damages.**—In actions for damages at common law, when from the language of the act, the employer is presumed to come under it, the burden is on the employee to allege and establish the employer's rejection of the act or the fact which prevents the application of the Workmen's Compensation Act to the employee.⁸² As for example under some acts the employee may allege and prove that his average annual earnings exceed the stated amount exempted by the act, under others that he has rejected the act, that his employer employs regularly less than three or five employees, that he is a farm hand, casual employee, family chauffeur, domestic servant, outworker, official of a political subdivision, or that his employer has failed to insure his risk, as required by the Act,⁸³ the pleading and proof of any one of which facts would entitle the employee to sue for damages at common law.⁸⁴ But where an employer is

81. *Aetna Life Ins. Co. v. Indus. Acc. Comm.*, — Cal. —, 165 Pac. 15, A 1 W. C. L. J. 111.

82. *Reynolds v. Chicago City R. R. Co.*, 287 Ill. 124, (1919), 122 N. E. 371, 3 W. C. L. J. 608; *Beveridge v. Ill. Fuel Co.*, 283 Ill. 31, 119 N. E. 46, 17 N. C. C. A. 463; *Barnes v. Illinois Fuel Co.*, 283 Ill. 173, 119 N. E. 48, 17 N. C. C. A. 476. *Palmieri v. Illinois Third Vein Coal Co.*, 208 Ill. App. 405, 17 N. C. C. A. 476; *Synkus v. Big Muddy Coal & Iron Co.*, 190 Ill. App. 602; See 31 N. E. 46, *Barnes v. Beamboch Piano Co.*, 101 Misc. Rep. 669, 167 N. Y. S. 933, 1 W. C. L. J. 703; *Louis v. Smith-McCormick Const. Co.*, 80 W. Va. 59, 92 S. E. 249. Contra, *Mitchell v. Swanwood Coal Co.*, (Ia.) 166 N. W. 391, 1 W. C. L. J., 602; *Balen v. Colfax Consolidated Coal Co.*, 183 Ia. 1198, 168 N. W. 246, 17 N. C. C. A. 512. See also *Waterman Lumber Co. v. Beatty* (Tex. Civ. App.) 204 S. W. 448, 2 W. C. L. J. 706; *Bishop v. Chicago Rys. Co.*, 290 Ill. 194, (1919), 124 N. E. 837; 5 W. C. L. J. 175; *Baggs v. Standard Oil Co. of N. Y.*, 180 N. Y. S. 560, 5 W. C. L. J. 740; *Ruddy v. Morse Dry Dock & Repair Co.*, 176 N. Y. 731, 107 Misc. 109, (1919), 4 W. C. L. J. 448; *Krisman v. Johnson Clay & Big Muddy Coal & Mining Co.*, 190 Ill. App. 612, 17 N. C. C. A. 527; *Nilsen v. American Bridge Co.*, 221 N. Y. 12, 116 N. E. 383, 17 N. C. C. A. 479.

83. *Gayton v. Borsowsky*, — Mass. —, 119 N. E. 831, 17 N. C. C. A. 517.

84. *Talge Mahogany Co. v. Burrows*, — Ind. —, 130 N. E. 867.

not presumed to come under the act the burden of proving that he has assented to come under the act is upon the employer.⁸⁵ Though where the evidence shows that the employee first prosecuted a claim for compensation under the act to final adjudication, the question of whether the employer had notified the employee of his election to come under the act is immaterial in an action at law against the employer by the employee.⁸⁶

It has also been held in some jurisdictions that the plaintiff employee need not allege the employer's rejection of the Act in his petition in an action for damages.⁸⁷

In Illinois under its Act of 1911, Sec. 3, it has been held that the employee must allege and prove that an independent violation of the factory Act was by the defendant's elective officer in order that the employee might recover damages at common law.

As a general rule it is not necessary for an employee to allege that he had rejected the act, if he has alleged the employer's rejection, which of itself, under most elective acts excludes the employee from the benefits of the act.⁸⁸ Should the employee plead and prove that he had rejected the act, prior to the accidental injury, for which compensation is claimed and the employer pleads and proves that he has accepted the act, then the latter may avail himself of the common-law defenses. The employee must also allege and prove negligence of the employer, his or its officers, agents or employees,⁹⁰ before he can recover.⁹¹ But

85. *Nadeau v. Caribou Water, Light & Power Co.*, 118 Me. 325, (1919), 108 Atl. 190, 5 W. C. L. J. 238; *Basso v. John T. Clark & Son*, 177 N. Y. S. 484, 108 Misc. 78 (1919), 4 W. C. L. J. 530; *Garvin v. Western Co-operative Co.*, 94 Oregon 487 (1919), 184 Pac. Rep. 555, 4 W. C. L. J. 738.

86. *Texas Refining Co. v. Alexander*, — Tex. Civ. App. — 202 S. W. 131, 17 N. C. C. A. 471.

87. *Nash v. Minneapolis and St. Louis Ry. Co.*, 141 Minn. 148, 169 N. W. 540, 3 W. C. L. J. 157; *Salvuca v. Ryan & Reilly Co.*, 129 Md. 235, 98 Atl. 675, 17 N. C. C. A. 477; *Chamberlain v. Luckenheimer Co.*, 25 Ohio S. & C. Pl. Dec. 368, 8 N. C. C. A. 670; *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244, 7 N. C. C. A. 48.

88. *Favro v. Superior Coal Co.*, 188 Ill. App. 203; *Dietz v. Big Muddy Coal Co.*, 263 Ill. 480, 5 N. C. C. A. 419.

90. *Watts v. Ohio Elect. R. Co.*, 78 W. Va. 144, 83 S. E. 659.

91. *Spivok v. Independent Sash & Door Co.*, 173 Cal. 438, 160 Pac. 565;

under the Iowa Act, section 2477-M, Subdiv. C(4), Code Supplement 1913, negligence on the part of the employer is presumed if it is shown that the accident arose out of and in the course of the employment,⁹² and negligence need not be pleaded.⁹³ This amounts to the establishment of something more than a statutory *res ipsa loquitur* doctrine, the constitutionality of which appears doubtful as depriving one of his property without due process of law. To compare it with criminal law it is in the nature of a presumption of guilt.

Evidence which tends only to establish assumption of risk or contributory negligence has no place or bearing in an action for damages against a non assenting Iowa employer unless it tends to show willful and intentional negligence on the part of the employee.⁹⁴

In an action for damages, at common law, against the employer by an employee, his or her dependents, heirs, legal representatives, or next of kin the employer may as a general rule set up as a defense, the fact that the deceased employee was covered by the act,⁹⁵ or that he has made a claim for compensation under the

* *Stornelli v. Duluth S. S. & A. Ry. Co.*, 193 Mich. 674, 160 N. Y. 415; *Price v. Clover Leaf Coal Mining Co.*, 188 Ill. App. 27; *Salus v. Great Northern R. Co.*, 157 Wis. 546, 147 N. Y. 1070; *Henshaw v. Boston etc., R. Co.*, 222 Mass. 459, 111 N. E. 172; *Walsh v. Turner Center Dairying Ass'n*, 223 Mass. 386, 111 N. E. 889; *Cross v. Boston & M. R. R. Co.*, 223 Mass. 144, 111 N. E. 676; *Lindenbauer v. Weiners*, 94 Misc. 612, 159 Supp. 987; *West Kentucky Coal. Co. v. Smithers*, — Ky. App. —, 211 S. W. 580, 4 W. C. L. J. 198; *Hunter v. Colfax Cons. Coal Co.*, 175 Ia. 245, 157 N. W. 145, L. R. A. 1917D, 15n, Ann. Cas. 1917E, 803; *Watts v. Ohio Elect. R. Co.*, 78 W. Va. 144, 88 S. E. 659; *Balen v. Colfax Coal Co.*, 183 Ia., 1198, 168 N. W. 246, 2 W. C. L. J. 621. Cannot recover if accident is due to servant's contributory negligence if the employer is permitted to set up that defense *Brown v. Lemon Cove Ditch Co.*, 36 Cal. App. 94, 171 Pac. 705, 1 W. O. L. J. 915.

92. *Mitchell v. Mystic Coal Co.*, — Ia. —, 179 N. W. 428, 6 W. C. L. J. 657; *Mitchell v. Swanwood Coal Co.*, 182 Ia. 1001, 166 N. W. 391.

93. *Mitchell v. Phillips Mining Co.*, 181 Ia. 600, 165 N. W. 108, 1 W. C. L. J. 190; *Mitchell v. Des Moines Coal Co.*, — Ia. —, 165 N. W. 113, 1 W. C. L. J. 200.

94. *Butkovitch v. Centerville Block Coal Co.*, — Iowa —, (1920), 177 N. W. 479, 6 W. C. L. J. 35.

95. *Zukas v. Appleton Mfg. Co.*, 297 Ill. 171, 116 N. E. 610.

act, or has in that manner exercised the option frequently given him when the employer has defaulted as to some duty required of him by the act,⁹⁶ which defenses release the employer from liability for damages.

But this contention will not avail others than the employer and in an action against third parties election of the employee to reject need not be alleged nor proved by the claimant.⁹⁷

The employer's rejection of the Act need not be alleged in every count.⁹⁸

It is held in Arizona that the Compensation Act does not restrict or limit the right of a personal representative to sue for wrongful death under paragraph 3372 Rev. Statutes, Arizona 1913.⁹⁹

In an action at common law for injuries caused by the negligence of a non-assenting employer, it was incumbent upon the plaintiff to prove, as he had alleged, that he was in the exercise of due care at the time of the injury. Defendant's admission during the course of the trial that he was employing more than five workmen, and that he was not an assenting employer did not relieve the plaintiff from the necessity of proving his allegation; the admission as to the number of workmen being immaterial as there was no allegation as to that fact, and in the absence of an appropriate allegation by way of a brief statement, it is assumed that the defendant is in Maine a non-assenting employer.¹

96. *Brabon v. Gladwin Light etc. Co.*, 201 Mich. 697, 167 N. W. 1024, 2 W. C. L. J. 302; *Arkansas Valley Ry. Light & Power Co. v. Ballinger*, — Ark. —, (1919), 178 Pac. 566, 3 W. C. L. J. 581.

97. *Vose v. Central Illinois Public Service Co.*, 286 Ill. 519, (1919) 122 N. E. 134, 3 W. C. L. J. 613.

98. *Hughes v. Eldorado Coal & Mining Co.*, 197 Ill. App. 259.

99. *Inspiration Consol. Copper Co. v. Conwell*, — Ariz. —, 190 Pac. 88, 6 W. C. L. J. 249; *Behringers Admix. etc., v. Inspiration Copper Co.*, 17 Ariz. 232, 149 Pac. 1065.

1. *Nicholas v. Folsom*, — Me. —, (1920), 110 Atl. 68, 6 W. C. L. J. 182; *Nadeau v. Caribou Light and Power Co.*, 118 Me. 325, 108 Atl. 190.

CHAPTER III.

WHO COMES UNDER THE ACT.

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38. Workmen Held Independent Contractors Not Employees.
39. Workmen Held Employees And Not Independent Contractors.
40. Owner of Premises As Employer Of The Employees Of His Con-
tractors And Subcontractors.
41. On, Or About the Premises.
42. Liability of Owner Or Lessor To Employees Of Lessee.
43. Dual Employers, Employments, And Business Enterprises.
44. Subrogation And Third Persons As Affected By The Acts.
45. Subrogation And Third Persons As Affected By The Acts. (Cont'd).
46. Cases Exclusively Covered By Federal Law.
47. Extra Territorial Application Of Acts.

§ 16. **General.**—The following provisions with varying slight modifications are typical of most American Compensation Acts.

“The word ‘employer’ as used in this act shall be construed to mean every person, partnership, association, corporation, trustee, receiver, and every other person, including any person or corporation operating a railroad, and any public service corporation, using the service of another for pay——.”

“The word ‘employee’ as used in this act shall be construed to mean every person in the service of any employer as defined in this act, under any contract of hire, express or implied, oral or written——.”

In the great majority of claims for compensation, no question arises as to whether the required contractual relation of employer and employee exists. There are, however, many cases where the question is difficult of determination and other cases where it is purposely made so by persons seeking to evade liability under the act.¹ For example, a workman may be loaned by one employer to another, an owner of teams employs drivers and rents the teams and drivers, sometimes including himself, for a stipulated sum for both, frequently a series of contracts and sub contracts clouds the question. Again, two or more employers between whom contractual relations exist may be interested in the same enterprise, making it difficult to say whether one is an employee of a particular employer or of all of them. A shareholder and vice president of a corporation who worked with the regular workmen, though at the same time acting as foreman, has claimed compensation as an employee and recovered;² while it has been held that the president and majority stockholder of a manufacturing corporation could not obtain compensation for injuries received while engaged in manual labor for the corporation.³ It would be impossible to formulate any gen-

1. *Mezansky v. Sissa*, 1 Conn. Comp. Dec. 430.

2. *Beckman v. Oelerich & Son*, 174 App. Div. 353, 160 N. Y. S. 791; *Benjamin v. Rorenberg Bros.*, 223 N. Y. 569, 119 N. E. 1030, 18 N. C. C. A. 906, Aff'g 180 N. Y. App. Div. 234, 167 N. Y. S. 655, 1 W. C. L. J. 670.

3. *Bowne v. Bowne Co.*, 221 N. Y. 28, 116 N. E., reversing the order 176 App. Div. 131, 162 N. Y. S. 244. But see *Kennedy v. Kennedy*

eral rule on these diverse cases that would be of much assistance. More can no doubt be accomplished by a study of the rulings and reasons of courts and commissions in the decided cases, which will facilitate reasoning by analogy to the logical ruling to be applied to the facts of the case at hand. In an Iowa case the court said of the terms "employer" and "employment" "They are not of the technical language of the law or of any science or pursuit and must, therefore be construed according to the context and the approved usage of the language."⁴

The construction of the terms employer and employee, as above set out, gives the general suggestion that a contract of hire, written or oral, express or implied, must be found to exist between the person claiming compensation and the one against whom the claim for compensation is made, otherwise the latter is not liable to pay the compensation provided under the act.⁵ As to when or where such contract exists is sometimes difficult of determination and much conflict is found in the decisions. The burden of establishing the existence of the contract or the relationship of employer in reference to some matter outside the risks assumed titled to compensation.⁶

Mfg. etc. Co., 177 App. Div. 56, 163 N. Y. S. 944, reargument granted in 178 App. Div. 946, 165 N. Y. S. 1094; Howard v. Howard, 221 N. Y. 605, 117 N. E. 1072, 15 N. C. C. A. 461.

4. The State v. Foster, 37 Ia. 404.

5. Lenk v. Kansas & T. Coal Co., 80 Mo. App. 374; Rhatigan v. Brooklyn Union Gas Co., 136 App. Div. 727; 121 Supp. 481; Kimball v. Cushman, 103 Mass. 194; Wood v. Cobb, 3 Allen, 58; United States Board and Paper Co. v. Landers, 47 Ind. App. 315, 93 N. E. 232; Singer Mfg. Co. v. Rahn, 132 U. S. 518; Sibley v. State, 89 Conn. 682, 96 Atl. 161, L. R. A. 1916C, 1087; Hillestad v. State Industrial Ins. Com., 80 Wash. 426, 141 Pac. 913, Ann. Cas. 1916B, 789; Kemp v. Lewis, 3 K. B. 543, 7 B. W. C. C. 422 C. A.; Wray v. Taylor, 109 L. T. Rep. N. S. 120; Bobbey v. Crosbie, 6 B. W. C. C. 592 C. A.; In re Cox, 225 Mass. 220, 114 N. E. 281; Pierson v. Rapid Transit Co., 102 Misc. Rep. 130, 168 N. Y. S. 425, 1 W. C. L. J. 705; Acklin Stamping Co. v. Kutz (Ohio), 120 N. E. 229, 2 W. C. L. J. 883; In re Connerford, 247 Mass. 571, 113 N. E. 460; Nissen Transfer & Storage Co. v. Miller, — Ind. —, 125 N. E. 652, 5 W. C. L. J. 519; Matter of Fitzgerald, 21 Misc. 226.

6. Zeitlow v. Smock, —Ind. App.—, 117 N. E. 665; Rockford City Tr. Co. v. Industrial Comm., —Ill.—, 129 N. E. 135.

§ 17. **Every Person, Corporation, Association, etc., as Employers.**—It has been held that the test by which to determine whether a person is an employer of another is to ascertain whether, at the time the injury was suffered, the other was subject to such person's orders and control and was liable to be discharged for disobedience of orders or misconduct.⁷ It appears however from the decisions that this rule is not always uniformly applied. It has been held that a caddie for a golf club, paid by the member whom he serves, is an employee of the club and not of the member he might be serving at the time of the accident;⁸ that an infant employer cannot evade the responsibilities of the act by reason of his infancy;⁹ that the relation of employer and employee does not depend upon the legality of the contract of employment;¹⁰ that an employee may compel the appointment of an administrator to take the place of the deceased employer from whom the employee was entitled to compensation;¹¹ that an owner of a chartered vessel and not the charterer is the employer of the captain;¹² that a person who has made colorable transfer of his business and not the transferee is the employer;¹³ that the owner of a garage is not the employer of another's chauffeur with whom he has an agreement to pay

7. *United States Board & Paper Co. v. Landers*, 47 Ind. App. 315, 93 N. E. 232; *Tuttle v. Embury Martin Lumber Co.*, 192 Mich. 385, 158 N. W. 875; *Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648. But see *Pollard v. Goole & Hull Stearn Towing Co. Ltd.*, 3 B. W. C. C. 366, C. A.; *State ex rel. Virginia & Rainy Lake Co. v. District Court*, 120 Minn. 43, 150 N. W. 211; *Mason v. Western Metal Co.*, 1 Cal. I. A. C. Dec. 284; *Smith v. Eichelberger*, 175 Ill. App. 231. Washington Act, 1921 § 6604-3.

8. *Harris v Claremont Country Club*, 2 Cal. Ind. Com. 972; *Claremont Country Club v. Indus. Acc. Com.*, 174 Cal. 395, 163 Pac. 209, 15 N. C. C. A. 448; *Chisolm Chase*, — Mass. —, 1921, 131 N. E. 161.

9. *Re Smith*, 17 West L. Rep. (Can.) 550.

10. *Boyle v. A. Cheney Piano Action Co.*, — N. Y. App. —, 184 Supp. 374, 7 W. C. L. J. 93.

11. *L. R. A. 1916A* (note) 113, *Re Bryne*, (1910 Prob.), 44 Ir. Law Times 98, 3 B. W. C. C. 591. Who are employers, see *L. R. A. 1916A*, note p. 13; Also *L. R. A. 1916A*, note p. 245.

12. *Norman v. Empire Literage & Wrecking Co.*, 2 N. Y. St. Dep. Rep. 480; *Mackinnon v. Miller*, (1909), 46 Scotch L. R. 299, 2 B. W. C. C. 64, Ct. of Sess.

13. *McCormick v. Sander*, 37 N. J. Law J. 56.

him a commission on any sales of automobiles he helps to effect where the chauffeur is injured while cranking a car which the garage owner was at the time trying to sell to a prospective buyer;¹⁴ that a contractor who assigned his contract but hired the employees and superintended the work was the real employer;¹⁵ that several different persons who employ a watchman to watch their respective premises are joint employers;¹⁶ and also that only the employer on whose premises he was injured is liable to pay compensation;¹⁷ that an employee may elect which of two employers to proceed against for compensation;¹⁸ that where a janitor, employed by a public school and others, was injured while at work in the school, the latter was liable for compensation;¹⁹ that employers jointly interested are severally liable to their respective employees²⁰ but where it is uncertain which of two or more interested in a joint enterprise is the employer, all are liable;²¹ that an employee who had been instructed by an officer of the company to do certain work about the home of an officer and was killed in such private work the company was liable for compensation;²² that six firms employing the same night watch-

14. *Lane v. Herrick*, 3 Cal. Ind. Acc. Com. 29.

15. *Schuman v. Employer's Liability Assurance Corp.*, 2 Mass. Ind. Acc. Bd. 599; *Kramer v. Schalke*, The Bulletin, N. Y. Vol. 1, No. 8, p. 8.

16. *Curran v. Newark Gear Cutting Machine Co.*, 37 N. J. Law J. 21.

17. *Mason v. Western Metal Supply Co.*, 1 Cal. Ind. Acc. Com. (Part II) 284, 11 N. C. C. A. 245, affirmed, *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491; *James v. Witherbee, Sherman & Co.*, 2 N. Y. St. Dep. Rep. 483.

18. *Johnson v. Mountain Commercial Co.*, 1 Cal. Ind. Acc. Com. (Part II), 100.

19. *Penfield v. Town of Glastonbury*, 1 Conn. Comp. Dec. 637.

20. *Old Times Distillery Co. v. Zehnder*, 52 S. W. 1051, 21 Ky. Law Rep. 753; *Spooner v. Detroit Saturday Night Co.*, Mich. Indus. Acc. Bd. July 1913; *Walker v. Santa Clara Oil & Dev. Co.*, 2 Cal. Ind. Acc. Com. 5.

21. *Schoen v. Chicago St. P. M. & O. Ry. Co.*, 127 N. W. 433, 112 Minn. 38, 45 L. R. A. (N. S.) 84; *Sinner v. Town of Colchester*, 1 Conn. Comp. Dec. 286.

22. *Del Priore v. Booth Bros. & H. I. Granite Co.*, 1 Conn. Comp. Dec. 300. *Contra re William A. Jones*, Claim No. 4173 Ohio Ind. Acc. Bd. June 4, 1913.

man do not constitute an association;²³ that one employed in the capacity of teamster could request a passerby to assist in such work, the Court remarking that, "The service rendered, though casual standing alone, was in the usual course of the relator's business, and therefore within the statute," and the passerby was awarded compensation;²⁴ that a bank is not an employer of one of its directors who performed no duties in connection therewith, except to attend directors' meetings, for which he received \$5.00 for each meeting;²⁵ that dairies are employers within the meaning of the act and not farmers;²⁶ that charitable institutions are employers;²⁷ that a railroad company is the employer of an apprentice fireman although the latter received no pay for his work;²⁸ that railroads engaged only in intrastate commerce can be considered employers within the meaning of the act.²⁹ When the Act excludes employees of railroad companies operating steam railroads as common carriers, the legislative intent was held to be that roads not operating as common carriers should remain under the act.³⁰

The relation of employer and employee was not terminated because the employee laid off from work the day preceding the

23. *Western Supply Metal Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390.

24. *State v. Ramsey Co.*, 138 Minn. 416, 165 N. W. 268, 1 W. C. L. J. 642; *Paul v. Peter Nikkel et al.*, 1 Cal. Ind. Acc. Com. 648; *Ginther Knickerbocker Co.*, 1 Cal. I. A. C. 458; *Tucker v. Buffalo Cotton Mills*, 57 S. E. 626, 76 S. C. 539.

25. *Burnham v. The Thames National Bank*, 1 Conn. Comp. Dec. 339.

26. Bulletin No. 11, Minn. Dep. Labor & Ind. 22.

27. *Mac. Gillivray v. The Northern Counties Institute for the Blind*, 4 B. W. C. C. 429, 11 N. C. C. A. 77; *Porton v. Central (Unemployed) Body for London* (1908), 100 L. T. 102, 2 B. W. C. C. 296; 11 N. C. C. A. 78, Leg. Op. Ia. Ind. Com. (1915), 13; *Garcia v. County of Los Angeles*, 3 Cal. Ind. Acc. Com. 330; *Burns v. Manchester & S. W. Mission* (1908) 99 L. T. 579; 1 B. W. C. C., 305; *Gilroy v. Mackie and others*, 46 Scotch L. R. 325, 11 N. C. C. A. 78.

28. *Smith v. Western & A. R. Co.*, 67 S. E. 818, 134 Ga. 216.

29. *Blevins v. The Dayton Union Ry. Co.*, 2 Bull. Ohio Ind. Com.

30. See also *Minneapolis, St. P. & S. S. M. Ry. Co. v. Ind. Com. of Wis.*, 141 N. W. 1119; 153 Wis. 552, 3 N. C. C. A. 707.

30. *State ex rel. Winston-Dear Co. v. Dist. C. of St. Louis Co.*, 145 Minn.—, 176 N. W. 749, 5 W. C. L. J. 711.

accident. The fact that he had been sent home by the superintendent and was told not to work when unable had no bearing inasmuch as he was doing work assigned him on the day of the accident.³¹

Where an employee was set to work without a physical examination, though the employer's rules required it, the employer was held to have waived the formality and the employee when injured in the course of his employment was held to have been an employee.³²

Where the evidence showed that two persons were jointly running a rock crushing business, though they sought to show that the sales department was a separate business, the employee who was killed at the crushing plant was held to be an employee of the joint employers.³³

One who contracted to take a picture for a film company for a certain sum and agreed to furnish all appurtenances and assistants, is the employer of those hired by him, the film company is not the employer of such assistants.³⁴

One employed as a pumper at an oil well had authority to secure incidental help, who would be in the employ of the owners of the oil lease.³⁵

A jobbing grinder who worked for other firms than his employer, was while so engaged not in the employ of the principal employer.³⁶

An oil company who selected, directed and controlled a timber scaler who was working for a lumber company upon the property of the oil company was the employer of the scaler, who was killed

31. *Chicago Cleaning Co. v. Ind. Board of Ill.*, 283 Ill. 177, 118 N. E. 989, 1 W. C. L. J. 940, 18 N. C. C. A. 906

32. *Illinois Central R. Co. v. Ind. Board of Ill.*, 284 Ill. 267, 119 N. E. 920, 2 W. C. L. J. 444.

33. *Gray v. Ind. Acc. Comm.*, 34 Cal. App. 713, 168 Pac. 702, 1 W. C. L. J. 151.

34. *McDough v. Ind. Acc. Comm.*, 34 Cal. App. 177, 166 Pac. 1024, 15 N. C. C. A. 448.

35. *Tillburg v. McCarthy & Townsend*, 179 N. Y. App. Div. 598, 166 N. Y. S. 878, 15 N. C. C. A. 449.

36. *Oates v. Thomas Turner & Co.*, (1916) W. C. & Ins. Rep. 335, 15 N. C. C. A. 450.

by a tree felled by the lumber company, even though the timber company contributed a portion of the employee's wage.³⁷

A manufacturing company which was installing a blow pipe system in another company's plant was the employer of a man who was under its direction and control, even though he was paid by the other company.³⁸

Where a partnership sublet a portion of its contract on a building to a corporation, and for the accommodation of the corporation hired a man who was never informed that he was in the employ of the corporation, but thought he was an employee of the partnership, the latter was held liable as his employer.³⁹

A watchman employed and paid by an interstate railroad at a crossing where the tracks of an intrastate railroad also crossed and half of whose wages were paid by the latter railroad, was an employee of both roads and could recover from the intrastate road even though the injuries resulting in death were caused by the interstate road.⁴⁰

The mere signing of checks for the wages of an employee does not make one an employer of the person receiving the checks.⁴¹

Where two men applied to G. for work and the next day he directed one of them to work for his father because G. could not use him, and he was injured, the father was the employer even though he may have been originally hired by G.⁴²

One who works under a general contractor in the repair of a city's fire alarm wires and is paid by the contractor, but, at the time of the injury, is doing the work in accordance with the orders of the city's superintendent of the fire department, is entitled to compensation as an employee of the city.⁴³

37. Kirby Lumber Co. v. McGilberry, — Tex. Civ. App. —, 205 S. W. 835, 3 W. C. L. J. 75.

38. Arnett v. Hayes Wheel Co., 201 Mich. 67, 166 N. W. 957, 1 W. C. L. J. 1061, 18 N. C. C. A. 916.

39. Scott v. O. A. Hankinson & Co., 205 Mich. 353, 171 N. W. 439, 3 W. C. L. J. 759, 18 N. C. C. A. 917.

40. San Francisco, Oakland Terminal Rys. v. Ind. Acc. Comm., 180 Cal. —, 179 Pac. 386, 3 W. C. L. J. 682, 18 N. C. C. A. 918.

41. Lezala v. Indus. Comm., — Mich. —, 175 N. W. 87.

42. Smith v. Eichelberger, 175 Ill. App. 231; Consolidated Fire Works v. Koehl, 190 Ill. 145.

43. Chisolm Case, — Mass. — 1921, 131 N. E. 161.

§ 18. **Every Person, Corporation, Association, etc., as Employers** (Cont'd)—One is none the less an employer by reason of a workman having been in his employment a very short time⁴⁴ or that he has a contract with a third person by virtue of which compensation will eventually fall on such third person.⁴⁵ It has been held that one is not the employer of a workman who applied for work and was refused it, but was sent by the first party to another who had requested of him the loan of a man;⁴⁶ that workmen engaged in mining coal are employees of the mine owner, though the operations are carried on under a contract with a third party, who selects and pays the workman but the mine owner has reserved control and supervision over the mine;⁴⁷ that the principal of an agent who employs helpers or assistants for the benefit of the principal is the employer of such helpers or assistants;⁴⁸ that a firm which employed a ganger to unload a barge of sulphur was not the employer of the men whom the ganger hired to help him and with whom he divided the money received for the work;⁴⁹ that the individual members of a labor union, an unincorporated association with no funds, are the employers of their janitor and cannot avoid personal liability for compensation;⁵⁰ that a rancher who hires nearby railroad section men to help fight a fire, though the railroad is not in danger, is their employer, even though their foreman also requested them to as-

44. *Lysons v. Knowles & Sons, Ltd.*, 3 W. C. C. 11; *Heist v. Wisconsin-Minnesota Light & Power Co.*, — Wis. —, (1920) 179 N. W. 583, 6 W. C. L. J. 728.

45. *Gallagher v. New York Central R. R. Co.*, *The Bulletin*, N. Y. Vol. 1, No. 11, p. 21.

46. *Boswell v. Gilbert*, 2 B. W. C. C. 251, C. C.

47. *Skinner v. Stratton Fire Clay Co.*, Vol. 1, No. 7, *Bul. Ohio Com.* p. 103.

48. *Dolan v. Judson*, 1 Conn. Comp. Dec. 362; *Schmidt v. William Pfeifer*, B. W. B. B. Co., *Bul.* No. 1, III, p. 118; *McNally v. Diamond Mills Paper Co.*, *The Bul.* N. Y. Vol. 1, No 11, p 12; *Peabody v. Town of Superior*, *Bud. Wis. Inds. Com.* Vol. 1, p. 99.

49. *Soloski v. Strickland*, 1 Conn. Comp. Dec. 564. *Contra*: *Bobby v. Crosbie*, W. C. & Ins. Rep. 366, (1916) *Rev'g W. C. & Ins. Rep.* 258 (1915) 15 N. C. C. A. 450.

50. *Gerber v. Central Council of Stockton*, 2 Cal. I. A. C. Dec. 554.

sist;⁵¹ that one who had a contract with a firm of plumbers and assigned to the firm one of his workmen to work for its benefit but paid the workman himself is the workmen's employer;⁵² that a corporation may be the employer of one of its officers;⁵³ that a receiver conducting the business of a corporation is the employer of its employees;⁵⁴ that a land owner is not the employer of a woodcutter hired by an agent of a contractor who contracted with the land owner to cut his wood, the woodcutter furnishing his own tools and determining his own hours;⁵⁵ that the fact that a father from time to time gave his son, nineteen years old, small sums of money did not make him his son's employer;⁵⁶ that a church could accept the Connecticut Act, but was not the employer of choir boys to whom it paid but twenty-five cents, per month, for moral and disciplinary purposes;⁵⁷ that a principal contractor is not the employer of one hired by a subcontractor on a wood

51. *Mazzini v. Pacific Coast Ry.*, 2 Cal. I. A. C. Dec. 758; *Kennelly v. Stearns Salt & Lumber Co.*, 190 Mich. 628, 157 N. W. 378; *London & Lancashire Guaranty & Acc. Co. v. Ind. Acc. Com.*, 173 Cal. 642, 161 Pac. 2.

52. *Iacovazzi v. Coppolo*, 1 Conn. Comp. Dec. 476.

53. *In re Rawnes*, 64 Ind. App. —, 118 N. E. 387, 1 W. C. L. J. 562; *Reddy v. National Excavating & Foundation Co.*, 178 App. Div. 943, 164 N. Y. Supp. 1110; *Re Howard*, 221 N. Y. 605, 117 N. E. 1072; *Berman v. Reliance Metal Spinning and Stamping Co.*, 175 N. Y. S. 838; *Cray v. Craycroft-Herrold Brick Co.*, 2 Cal. Ind. Acc. Com. 654; *Angus v. White Gulch Mining Co.*, 3 Cal. Ind. Acc. Com. 87; *Wilton v. Waterbury Rolling Mill Co.*, 1 Conn. Comp. Dec. 78; *Bowne v. Bowne*, 176 App. Div. 131, 162 Supp. 244; *Matter of Beckman v. Oelerich & Son*, 174 App. Div. 353, 160 Supp. 791; *Kenney v. Kenney Mfg. & Engineering Co.*, 7 N. Y. St. Dep. Rep. 383, 163 Supp. 944; *Contor v. Rubin Musicant Co.*, 3 N. Y. St. Dep. Rep. 392; *Koslowitsky v. Koslow Iron Works*, 4 N. Y. St. Dep. Rep. 360; *In re Moseley, Jr.*, 2 Bull. Ohio Ind. Com. 19.

54. *Wood v. Camden Iron Works (D. C.)* 221 Fed. 1010; *Devine v. Delano*, 111 N. E. 742; *Unrine v. Salina Northern R. Co. (Kan.)* 3 W. C. L. J. 633, 178 Pac. 614.

55. *Donlon Bros. v. Ind. Acc. Com.*, 173 Cal. 250, 159 Pac. 715; *Fidelity, etc. Co. v. Brush*, 176 Cal. 448, 168 Pac. 890, 1 W. C. L. J. 153.

56. *Aetna Life Ins. Co. v. Industrial Acc. Com.*, 175 Cal. 91, 165 Pac. 15.

57. *Loveland v. Parish of St. Thomas Church*, 1 Conn. Comp. Dec. 14 A church pastor is not an employee under the Iowa Act Leg. Op. Ia. Ind. Com. (1919), 15.

cutting job;⁵⁸ that an association formed as a medium of employment of its members, collecting their pay and distributing the same without deduction and without control over the work of the members, is not an independent contractor;⁵⁹ that where the owner of a building in need of repairs, called upon a general contractor and asked him to do the work, and he sent a plasterer who was in the habit of doing odd jobs for him, charging by the hour or job, such plasterer was not in the employ of the contractor;⁶⁰ that a contract to furnish the stone work for a post office building was held to show the relation of subcontractor and contractor and not employee and employer;⁶¹ that where a contract provided that a buyer of timber should reimburse the seller for wages paid scalers, not to exceed \$50.00 per month each, a scaler employed by, and who worked under the direction of the seller, at a salary of \$70.00 per month, was not an employee of the buyer.⁶²

Where an award was made against an employer who was a subcontractor and also against the insurance carrier of the general contractor, it was held that the commission had had no authority to make an award against any other person than the immediate employer, and the award against the general contractor's carrier was dismissed.⁶³ In an earlier case in the same state the court said, "This court decided in *Sturdivant v. Pillsbury et al.*, 172 Cal. 581, 158 Pac. 222, and *Carstens v. Pillsbury et al.*, 172 Cal. 572, 158 Pac. 218, * * * that under the Constitution the Legislature was not empowered to confer judicial authority upon the commission to inquire into, determine and enforce liabilities under Sec. 30 of the act, in favor of the employee against persons other than his immediate employer."⁶⁴ Contra to the above, under the Massachusetts Act, an employee of an independent con-

58. *Tangournos v. Smith*, 183 N. Y. App. Div. 751, 171 N. Y. S. 256, 2 W. C. L. J. 686.

59. *Holcomb v. Standard Oil Co., et al.*, 5 Cal. I. A. C. Dec. 240.

60. *Woodhall v. Irwin*, 167 N. W. 845, 201 Mich. 400.

61. *Mobley v. J. S. Rogers Co.*, (Ind. App.), 119 N. E. 477.

62. *Kirby Lumber Co. v. McGilberry*, (Texas), 205 S. W. 835.

63. *Worswick Street Paving Co. v. Ind. Acc. Comm. et al.*, 180 Cal. —, 185 Pac. 953, 5 W. C. L. J. 342, 185 Pac. 958, 5 W. C. L. J. 349; 185 Pac. 958; 5 W. C. L. J. 350; 185 Pac. 959, 5 W. C. L. J. 351.

64. *Thaxter v. Finn*, 178 Cal. 270, 173 Pac. 163, 2 W. C. L. J. 431.

tractor may recover compensation from the principal where he was engaged in work for and under the control of the principal, upon the principal's premises, and in the course of the principal's business, though his immediate employer was a subcontractor of the principal.⁶⁵

Section 31 of the Illinois Act provides that if the principal contractor does not require the subcontractor to protect his employees by insurance, the principal employer shall be deemed an employer jointly with the immediate employer.⁶⁶

§ 19. **Employees Generally.**—The subject, who are employees, is naturally the other half of the subject, who are employers, as you do not have the one without the other. While the definition of the term employee, as given in a number of the acts, is as specific as it well may be, there are nevertheless many cases where the application of the definition is difficult and an examination of the decisions will be helpful.

It may properly be reiterated here that the rules for determining the existence of the relation of employer and employee are the same as those at common law for the relation of master and servant.⁶⁷ Though it does not follow from the fact of the existence of the relation of employer and employee or master and servant that the compensation act applies, as it must further be determined that the relation does not come within any one of the employments exempted by the act. The term employee, as used in some Acts, is a broader term than "workman," which is used instead in other acts. As for example in an English case a lecturer was held not to be a workman and therefore not under the act.⁶⁸

65. *In re Comerford*, 229 Mass. 573, 118 N. E. 900, 1 W. C. L. J. 793.

66. *Butler Street Foundry & Iron Co. v. Ind. Board of Illinois*, 277 Ill. 70, 115 N. E. 122, 15 N. C. C. A. 486.

67. *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 Pac. 721; *Lenk v. Kansas & T. Coal Co.*, 80 Mo. App. 374; *Rhatigan v. Brooklyn, Union Gas Co.*, 136 App. Div. 727, 121 Supp. 481; *Kimball v. Cushman*, 103 Mass. 194; *Wood v. Cobb*, 3 Allen 58; *United States Board & Paper Co. v. Landers*, 47 Ind. App. 315, 93 N. E. 232; *Singer Mfg. Co. v. Rahn*, Vt. —, 1921, 113 Atl. 818, 132 U. S. 518, 33 L. Ed. 440; *Kelly's Dependents v. Hoosac Lbr. Co.*, — Vt. — (1921), 113 Atl. 818.

68. *Waites v. Franco-British Exhibition (Inc.)* (1909), 2 B. W. C. C. 199.

In a recent New Hampshire case the court said, "The test to determine whether an employee is entitled to the benefit of the act is to inquire whether: (1) He was engaged in manual or mechanical labor; (2) any part of his work was done in proximity to hoisting apparatus or power-driven machinery (*Moran v. Nashua Mfg. Co.*, 78 N. H. 567, 103 Atl. 312); and (3) whether five or more persons engaged in manual or mechanical labor were employed in and about the mill, etc., in which he worked."⁶⁹

Where miners subtracted a certain sum per ton from the price paid them for mining coal and paid it to a shot firer whom they hired, supervised, and had the authority to discharge, it was held the power was delegated to them by the operators, and the shot firer was an employee of the mine operators.⁷⁰

An applicant for a position as a conductor on a street railway, who had never been appointed and was to receive no compensation unless he was accepted, and then to receive a bonus at the end of the first month, was not an employee of the street railway.⁷¹

In a Connecticut case the court said: "One is an employee of another when he renders service for him and what he agrees to do or is directed to do is subject to the will of that other in the mode and manner in which the service is to be done and in the means to be employed in its accomplishment as well as in the result to be attained," and held that a reporter who was under the direction of the publishers was an employee, even though he had other employment when not serving the publishers.⁷²

In a Utah case, the court adopted the definition from 2 Words and Phrases (New Series) 261, "An employee is one who works for and under the control of another for hire."⁷³

69. *Regnier v. Rand*, 79 N. H. —, 108 Atl. 810, 5 W. C. L. J. 559.

70. *Bidwell Coal Co. v. Davidson* (Iowa), 174 N. W. 592, 5 W. C. L. J. 71.

71. *Fineburg v. Public Service Ry. Co.*, 94 N. J. L. —, 108 Atl. 311, 5 W. C. L. J. 299.

72. *Kinsman v. Hartford Courant Co.*, 94 Conn. —, 108 Atl. 562, 5 W. C. L. J. 361.

73. *Stricker v. Indus. Comm.*, — Utah —, 188 Pac. 849, 5 W. C. L. J. 920.

That the term applies only to those in civil, as distinguished from military service, was held in a New York case. Notwithstanding the employee in that case was paid by the city of New York, he was held to be in military service and not protected by the Compensation Act.⁷⁴

It has been held that in construing the word, courts will apply the rule of liberal construction.⁷⁵

§ 20. **Who are Employees.**—Employees who enter into a private agreement with their employers to waive their rights under the act are nevertheless employees within the intent of the act, and entitled to its benefits,⁷⁶ first, because such agreements are expressly prohibited by special provisions in most Compensation Acts, and, second, they have been held to be contrary to public policy. An employee is such within the meaning of the Compensation acts even though his contract of employment existed prior to the passage of the act. The acts do not impair the obligations of the contract,⁷⁷ as all contracts are subject to the police power;⁷⁸ though the acts do not apply to an action for injuries which occurred prior to the passage of the act.⁷⁹

It has been held that where an agreement has been made to pay compensation to the captain of a sailing vessel, during his disability, the owners were estopped from afterwards denying that the relation of master and servant existed;⁸⁰ that though a workman obtained employment by means of a false statement in

74. *Muller v. New York*, 189 App. Div. 363, 178 N. Y. Supp. 416.

75. *Marshall Field & Co. v. Industrial Comm.*, 285 Ill. 333.

76. *Powley v. Vivian & Co.*, 169 App. Div. 170, 154 Supp. 426, 10 N. C. C. A. 835; *Chicago Railways Co. v. Industrial Board*, 276 Ill. 112, 114 N. E. 534; *In re Geo. M. Gerhauser*, 2nd A. R. U. S. C. C. 241; *Shaughnessy v. Northland S. S. Co.*, — Wash. —, 162 Pac. 546, B 1 W. C. L. J. 1602.

77. *State ex rel. Nelson-Spelliscy Co. v. District Court of Meeker County*, 128 Minn. 221, — N. W. 623, 11 N. C. C. A. 636; *State v. City of Seattle*, 73 Wash. 396, 132 Pac. 45.

78. *In re McGuire*, 31 Sup. Ct. 259, 55 L. Ed. 328, 219 U. S. 549; *Railway v. Schubert*, 224 U. S. 603, 56 L. Ed. 911; *State v. Creamer*, 85 Ohio St. 349, 39 L. R. A. (N. S.) 694.

79. *Arizona & N. M. Ry. Co. v. Clark*, 207 Fed. 817.

80. *Goodsell v. Steamship "Lloyd"*, 7 B. W. C. C. 631.

writing that amounted to a misdemeanor, under the New York Penal Law, § 939, he was nevertheless an employee within the meaning of the Compensation Act;⁸¹ that the mere intention of an employee to quit his position after a certain period does not discontinue his status as an employee where he has not yet acted on his intent;⁸² that a substitute, employed and paid by a workman who is ill, is the employee of the sick workmen's employer;⁸³ but it has been held otherwise where a substitute other than the one authorized was employed;⁸⁴ or where one was employed unnecessarily and without authority;⁸⁵ that a carpenter who voluntarily did work on a structure in the course of construction, in hope of later being employed, was not an employee and compensation was refused;⁸⁶ that a journeyman paper hanger hired by a foreman of a department store's wall paper department to go to the residence of purchasers to hang paper, was an employee of the department store, as it paid him for his work and retained authority to control the work;⁸⁷ that an apprentice qualifying himself for the operation of an elevator was an employee,⁸⁸ even though such apprentice may receive no pay for his services;⁸⁹ that a piece worker over whose work the employer exercises general supervision is an employee;⁹⁰ that a physician injured when returning from attend-

81. *Kenny v. Union Ry. Co.*, 166 App. Div. 497, 152 Supp. 117, 8 N. C. C. A. 986; *Galveston H. S. A. Ry. Co. v. Harris*; 107, S. W. 108; 48 Tex. Civ. App. 434.

82. *Goering v. The Brooklyn Mining Co.*, 2 Cal. Ind. Acc. Com. 124; 12 N. C. C. A. 245.

83. *Goshman v. Boggish*, 1 Conn. Comp. Dec. 572; *Campbell v. City of Los Angeles*, 2 Cal. Ind. Acc. Com. 300; *Clark v. Morrison and Burns*, 2 Cal. Ind. Acc. Com. 110.

84. *McClelland v. Todd*, (1909), 43 Irish L. T. J. 75; 2 B. W. C. C. 472.

85. *Corrigan v. Hunter*, 122 S. W. 131, 139 Ky. 315.

86. *Steiman v. Anshl Sford*, 2 Cal. Ind. Acc. Com. 944; *Artenstein v. Employers Liability Assur. Corp. Ltd.*, 2 Mass. Wk. Comp. Cases 699.

87. *In re McAllister* 229 Mass. 193, 118 N. E. 326, 1 W. C. L. J. 618.

88. *Pettee v. Noyes*, 133 Minn. 109, 157 N. W. 995; *Kilbury v. Vitch*, 4 N. Y. St. Dep. Rep. 434.

89. *Smith v. Western & A. R. Co.*, 67 S. E. 818; 134 Ga. 216. *Contra: Turner v. S. S. Haulwen*, 8 B. W. C. C. 242; *Beatty v. San Diego Elec. Ry. Co.*, 5 Cal. Ind. Acc. Com. 241.

90. *State ex rel. Va. & Rainy Lake Co. v. Dist. Ct. of St. Louis, Co., et.*

ing to an incapacitated employee was entitled to compensation, as he attended to all compensation cases for his employer under general contract of hire to render such services;⁹¹ that the superintendent of a mill is an employee;⁹² that the general manager of a corporation is an employee;⁹³ (though they are by some acts expressly excluded)⁹⁴ that an expert mining engineer retained for consulting purposes is not an employee;⁹⁵ that a small boy who receives candy and fruit for helping a delivery man for a grocery store, deliver goods, is not an employee,⁹⁶ that book agents or canvassers, who may devote as much time or as little as they desire, to their work, are no employees;⁹⁷ that a salesman working on a commission with a guaranteed net return is an employee;⁹⁸ that a moving picture actor is an employee;⁹⁹ that where a married woman cannot contract with her husband she can not contract to be his employee.¹

al., 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076; *Travis v Hobbs*, Wall & Co., 2 Cal. Ind. Acc. Com. 506; *Hale v. Johnson*, 2 Cal. Ind. Acc. Com. 366; *Ryan v. Tipperary North Riding County Council*, 8 B. W. C. C. 415; *Stonaker v. Jones & Delaney*, 2 Cal. Ind. Acc. Com. 831; *Malott v. Healey*, 2 Cal. I. A. C. Dec. 103; *In re Reinwold*, 168 App. Div. 425; 153 Supp. 598; *Missouri K. T. Ry. Co. v. Romans*, 114 S. W. 157. (Tex. Civ. App....)

91. *Getzlaff v. Dr. N. T. Enloe*, 3 Cal. Ind. Acc. Com. 18.

92. *Aken v. Barnet & Aufesser Knitting Co.*, 118 App. Div. 463, 103 Supp. 1078; *Miller's Mut. Casualty Co. v. Hoover et. al.*,—Tex. Civ. App.—, 216 S. W. 475, 5 W. C. L. J. 325.

93. *Head v. Fidelity and Deposit Co.*, 1 Cal. Ind. Acc. Com. (Part II) 451.

94. *Bowne v. S. W. Bowne Co.*, — N. Y. App. Div. —, 116 N. E. 364, B 1 W. C. L. J. 1183; *Millers' Indemnity Underwriters v. Cook*, — Tex. Civ. App. — 229 S. W. 598, Section 9 West Virginia Act Managers, Assistant Managers, Assistant Superintendents excluded.

95. Report of Nevada Ind. Com. July 1, 1913 to Dec. 31, 1914, p. 26.

96. *Taylor v. The New York Supply Co.*, 1 Conn. Comp. Dec. 182.

97. *Skidmore v. Brown*, 2 Cal. Ind. Acc. Com. 493.

98. *Gurnett v. L. P. Ross Co.*, 167 N. Y. Supp. 1102, 181 App. Div. 910. *Brown v. Ind. Acc. Comm.* 174 Cal. 457, 163 Pac. 664.

99. *Chandler et. al. v. J. L. Lasky Feature Play Co.*, 2 Cal. Ind. Acc. Com. 653, See also *Stites v. Universal Film Co.*, 2 Cal. Ind. Acc. Comm. 653, 12 N. C. C. A. 1033.

1. *In re Humphrey*, 227 Mass. 166, 116 N. E. 412, 15 N. C. C. A. 458.

The president of a corporation, owning half of the stock, injured while superintending a job, was not an employee, where his salary was not considered in arriving at the premium in taking out a policy covering the employees.²

But where the president of a corporation was employed by its manager to work in its coal yard at \$2.00 per day, was carried on the payroll, and obeyed the manager's orders, he was an employee.³

Where the superintendent of light lines, in a telephone conversation with his wife, authorized her to get some one to fix a break in the lines, and mentioned a certain one to get, the court held that the suggestion was merely advisory, and a different party selected by the wife was an employee entitling his dependents to receive compensation for his death.⁴

One who, being slightly intoxicated, was ordered to go home but returned to work and was killed; was held to be an employee at the time of meeting with the fatal accident.⁵

The president and treasurer of a corporation, who managed and directed its business, received a salary which was included in the payroll, and on which premium was paid to the insurer, was not entitled to compensation, where there was no separate statement added to the payroll estimating the wage value of the labor incidental to his occupation, as distinguishable from his salary as an officer.⁶

But where it was not shown that a portion of the salary received by such officer was in contemplation of his performance of manual duties an award cannot stand.⁷

2. *Cashman's Case*, 230 Mass. 600, 120 N. E. 78, 2 W. C. L. J. 637.

3. *Dewy v. Dewy Fuel Co.*, — Mich. — 178 N. W. 36, 6 W. C. L. J. 330.

4. *American Bridge Co. v. Funk Ind. Comm.*, — Iowa —, 173 N. W. 119, 4 W. C. L. J. 374.

5. *Heist v. Wisconsin-Minnesota Light and Power Co.*, — Wis. —, 179 N. W. 583, 6 W. C. L. J. 728.

6. *Skountchi v. Chic Cloak & Suit Co.*, 183 N. Y. S. 321, (1920), 6 W. C. L. J. 492, *affd.* 1921, 130 N. E. 229; *Hubbs v. Addison Elect. Light & Power Co.*, — N. Y. App. —, (1921), 130 N. E. 302.

7. *Kolpien v. O'Donnell Lbr. Co.*, — N. Y. App. —, (1921), 130 N. E. 103.

A shot firer, selected by the miners themselves from whose wages a small amount was deducted and paid into the union which paid the firer, though these provisions were not considered when the arrangement of hiring was made, was held to be an employee of the mine, where the company agreed with its miners that they might select, supervise, and discharge the shot firer.⁸

One engaged to do a specific job, over which the employer retains no right of control, is not an employee.⁹

A taxi driver, allowed to retain 25 per cent of the amount earned, accounting to the owner of the taxi for the remainder, is a bailee and not an employee.¹⁰

A substitute is not an employee entitled to the protection of the act unless the one he substituted for was within the act.¹¹ Nor are partners employees.¹²

A minor child working for his father is not an employee within the meaning of the California Act, where there has not been an actual emancipation of the child.¹³ See section 14, ante.

One drafted into the army, and sent as a member of a military company to work with civilian employees of a logging company operating for the government, is within the protection of the act.¹⁴

Under the Vermont act an employee who receives over \$2000 a year, under a contract to continue for a period of a year or longer at a determined or determinable wage amounting to more than \$2000 a year is excluded from the benefits of the act.¹⁵

8. *In re Duncan*, — Ind. App. —, (1920), 127 N. E. 289, 6 W. C. L. J. 148; *Bidwell Coal Co. v. Davidson*, — Iowa —, 174 N. W. 592, 5 W. C. L. J. 71.

9. *Roberts v. Indus. Comm.*, — Cal. —, (1921), 197 Pac. 978.

10. *Rockefeller v. Indus. Comm.*, — Utah —, (1921), 197 Pac. 1038.

11. Same.

12. Same.

13. *Aetna Life Ins. Co. v. Indus. Acc. Comm.*, — Cal. —, 165 Pac. 15, A 1 W. C. L. J. 111.

14. *Rector v. Cherry Valley Timber Co.*, — Wash. —, (1921), 169 Pac. 653.

15. *Kelly's Dependents v. Hoosac Lbr. Co.*, — Vt. —, (1921), 113 Atl. 818. North Dakota Act amended 1921, § 8, \$2400.

§ 21. **Who are Employees.** (Cont'd)—It has been held that a nurse is the employee of the hospital in which she works, even though the hospital makes a special charge to the patient for the nurse, and only pays that amount to the nurse when it has been paid by the patient;¹⁶ that neither a professional nurse nor a physician is an employee under the Iowa and British acts;¹⁷ that chorus girls, vaudeville performers and professional football players may be employees;¹⁸ that a superintendent of construction, having peculiar skill and knowledge as an inventor of an apparatus in use, is allowed great liberty of action as to purchase of materials and manner of construction, does not necessarily indicate that lack of control on the part of his employer which would make the superintendent an independent contractor rather than an employee.¹⁹ That where an agent of a company employed others to assist him in making sales, deliveries and collections, invested some of his own capital in the business, and was under no supervision or direction of his principals, he was not an employee;²⁰ that a traveling salesman, selling goods for the defendant, receiving half the profits for his work, paying his own expenses and being forbidden to solicit regular customers of the company, was an employee;²¹ that the fact that a workman undertakes to do a special job with his own tools and materials, does not of itself prevent him from being an employee;²² that the manager of defendant's business, who had no agreement as to the amount of his wages, but drew large sums from time to time, was an employee;²³ that an employee who was employed for fixed hours

16. *Williamson v. St. Catherine's Hospital*, 2 Cal. Ind. Acc. Com. 430, 11 N. C. C. A. 497.

17. *Leg. Op. Ia. Ind. Com.* (1915), 14; *Murphy v. Enniscorthy Board of Guardians*, 2 B. W. C. C. 291, C. A.

18. *Gaiety Theatre Co. v. Mary Rockwell*, 1 Cal. Ind. Acc. Com. (Part 1) 111; *Howard v. Republic Theatre*, 2 Cal. I. A. C. Dec. 514; *Walker v. Crystal Palace Football Club*, 3 B. W. C. C. 53, C. A.

19. *Turner v. Oil Pumping & Gasoline Co.*, 2 Cal. I. A. C. Dec. 496.

20. *Fineblum v. Singer Sewing Machine Co.*, 1 Conn. Comp. Dec. 126.

21. *Reed v. Booth & Platt Co.*, 1 Conn. Comp. Dec. 121; *Brown v. Indus. Comm.* — Cal. —, 163 Pac. 664, A 1 W. C. L. J. 119.

22. *In re Rhienwald* 168 App. Div. 425, 153 N. Y. Supp. 598.

23. *Howard v. George Howard Inc., The Bull.* N. Y. Vol. 1, No. 11, P. 14.

and at a specified salary, but was allowed a commission for new business obtained after hours was an employee regardless of which work he was doing;²⁴ that where a claimant had a contract as supervisor of defendant's casting department and spent half his time travelling in the interest of the company, of which he was director and treasurer, though he received no salary for the latter duties, this did not preclude him from being an employee;²⁵ that convicts are not engaged in any contract employment;²⁶ under the British act one is not ordinarily considered an employee, when he is paid for his services by a share in the profits,²⁷ but it has been held otherwise under some American acts.²⁸

It has been held that where a steel tester making £2 per week obtained an agreement with his employers, which allowed him to live, rent free, in a cottage nearby in return for which he was to see to the cleaning of the offices, his daughter doing the work, and he was killed by gas, while asleep in his bedroom, there was no contract of service and deceased was not an employee;²⁹ that one who visited defendant's office seeking employment and was directed by defendant to go to the defendants logging camp, on a logging train and was injured on the way, was not an employee;³⁰ that the relation of employer and employee is not limited to express contracts;³¹ that the rights of employees are not affected

24. *Cameron v. Pillsbury*, 173 Cal. 83, 159 Pac. 149.

25. *Welton v. Waterbury Rolling Mill*, 1 Conn. Comp. Dec. 78; *Eagleson v. Harry G. Preston Co.*, — Penn. —, 109 Atl. 154, 5 W. C. L. J. 744.

26. *Ryan v. Metropolitan Chair Co.*, 1 Conn. Comp. Dec. 37; (*Wk. Comp. Act. Wash.* 17), *Op. Atty. Gen.* Sept. 17, 1913.

27. *Admiral Fishing Co. Ltd. v. Robinson*, 3 B. W. C. C. 247 C. A.; *Tindall v. Great Northern Steam Fishing Co.*, 6 B. W. C. C. 480 H. L.; *Boon v. Quance*, 102 L. T. 443, 3 B. W. C. C. 106 C. A.; *Burman v. Zodiac Steam Fishing Co.*, 7 B. W. C. C. 767 C. A.; *Smith v. General Motor Cab Co., Ltd.*, (1911), A. C. 188; *Daggett v. Waterloo Taxicab Co., Ltd.*, 3 B. W. C. C. 371 C. A.

28. *Reed v. Booth & Platt Co.*, 1 Conn. Comp. Dec. 121, *Op. Sp. Counsel to Ia. Ind. Com.*, (1915), p. 3.

29. *Wray v. Taylor Bros. & Co., Ltd.* 6 B. W. C. C. 529, C. A.

30. *Susznik v. Alger Logging Co.*, 76 Or. 189, 147 Pac. 922.

31. *Reitmeyer v. Core Bros. & Co.*, — Pa. —, 107 Atl. 739, 4 W. C. L. J. 644.

by the invalidity of their employer's subcontract;³² that one injured while on the premises and before the contract of employment was entered into was not an employee.³³

§ 22. **Employment Through Agents and Assistants.**—The agent who with authority express or implied, employs help for the benefit of his principal's business, thereby creates the relation of employer and employee between such help and his principal.³⁴ So it has been held that where a driver, employed to solicit sales of beer and make delivery, was permitted to employ helpers, a helper who was injured while in the performance of his duty was entitled to compensation from the brewery;³⁵ that an expert, hired by a factory owner to supervise the installation of machinery, who hired assistants, paid by the owner, one of such assistants being injured while so engaged was entitled to compensation from the factory owner;³⁶ that workmen hired by an agent of a com-

32. *Wauson Lumber Co. v. Industrial Acci. Comm.*, 166 Wis. 204, 164 N. W. 836, 1 W. C. L. J. 140.

33. *Brassard v. Delaware & H. Co.*, 186 App. Div. 647, 175 N. Y. S. 359, 4 W. C. L. J. 130, 18 N. C. C. A. 912; *California Highway Comm. v. Indus. Comm.*, — Cal. —, 181 Pac. 112, 4 W. C. L. J. 150.

34. *Paul v. Nikkel*, 1 Cal. I. A. C. Dec. 362; *Dolan v. Judson*, 1 Conn. Comp. Dec. 648; *Gallagher v. Federal Transfer Co.*, and *Maryland Casualty Co.*, 1 Cal. Ind. Acc. Com. (Part II), 39; *Paduca Box & Basket Co. v. Parker*, 136 S. W. 1012, 143 Ky. 607, 43 L. R. A. (N. S.) 179 Ill. Cent. R. Co. v. *Timmons*, 100 S. W. 337; 30 Ky. Law Rep. 1155; *Yazoo & M. V. R. Co. v. Slaughter*, 45 So. 873; 92 Miss. 289; *Wells v. Ky. Distillers & Warehouse Co.*, 138 S. W. 278, 144 Ky. 438; *Tucker v. Buffalo Cotton Mills*, 57 S. E. 626, 75 S. C. 539; *Peterson v. Pellasco*, 2 Cal. Ind. Acc. Com. 199, 11 N. C. C. A. 377; *Tillburg v. McCarthy*, 166 N. Y. S. 878, 179 App. Div. 593; 15 N. C. C. A. 449; *State ex rel. Menaber v. Dist. Court of Ramsey Co.*, 138 Minn. 416, 165 N. W. 268; *Yolo Water & Power Co. v. Ind. Acc. Comm.*, 35 Cal. 14, 168 Pac. 1146, 15 N. C. C. A. 452, *State ex rel. Nienabar v. Dist. Ct. of Ramsey Co. et al.*, 138 Minn. 416, 165 N. W. 268, 1 W. C. L. J. 642.

35. *Sandon v. Kendall* — Mass., —, 123 N. E. 847, 4 W. C. L. J. 501; *Schmidt v. Wm. Pfeiffer Berlin Weiss Beer Brewing Co.*, Bul. No. 1, Ill. p. 118; *Vance v. Peter A. Frazee & Co.*, 166 N. Y. Supp., 117, 179 App. Div. 963.

36. *McNally v. Diamond Mills Paper Co.*, The Bul. N. Y. Vol. 1. No. 11, p. 12, *Opitz v. Hoertz*, 194 Mich. 626, 161 N. W. 866.

pany, which took over the logging work of an independent contractor, became the employees of the company;³⁷ that when a town's agent builds a bridge for the town at a stipulated price per day for himself and his workmen, he makes such workmen the employees of the town;³⁸ that a railroad company is not liable for damages to one employed by a conductor when he has a full crew, and there is no emergency;³⁹ that the son of a town marshal injured while operating a pump at his father's request, when the latter had no express authority to hire an assistant, was not entitled to compensation from the town;⁴⁰ that one employed to do a specific piece of work cannot make those whom he may employ to help him, the employees of his employer;⁴¹ that a public school is the employer of a window washer hired twice a year by its janitor and paid by the janitor out of his own wages without authority from the school board, though not without its knowledge;⁴² that one who is acting as the agent for another, and hires a man without disclosing his principal may become liable to such employee for compensation;⁴³ that a foreman in full charge of all the employees in a room, is an "agent," whose knowledge of an accident makes written notice unnecessary;⁴⁴ that where a substitute, unofficially appointed, sustains an injury, he is not entitled to compensation;⁴⁵ that where the father of the owner of a building had authority to look after small matters about the building and there

37. *Freeman v. Dells Paper & Pulp Co.*, 150 Wis. 93, 135 N. W. 540.

38. *Peabody v. Town of Superior*, Bul. Wis. Ind. Com. Vol. 1, p. 99, *Village of West Salem v. Ind. Com.*, 162 Wis. 57, 155 N. W. 929.

39. *Clarke v. Louisville & N. R. Co.*, 111 S. W. 344; 33 Ky. Law Rep. 797; *Vassar v. Atlantic Coast Line R. Co.*, 54 S. E. 849; 142 N. C. 68; 7 L. R. A. (N. S.) 950; *Yazoo & M. V. R. Co. v. Stansberry*, 53 So. 389; 97 Miss. 831; *Wagon v. Minneapolis & St. L. R. A. Co.*, 80 Minn. 92; 82 N. W. 1107; But see *Paul v. Peter Nikkel*, 1 Cal. Ind. Acc. Com. (Part II) 648, 11 N. C. C. A. 376; *McCutcheon v. Marinette, Tomahawk & Western R. Co.*, Fourth Annual Report (1915), Wis. Ind. Com. 13.

40. *Noonan v. City of Perris*, 2 Cal. Ind. Acc. Com. 109.

41. *Kackel v. Serviss*, 180 App. Div. 54, 167 N. Y. Supp. 348.

42. *Sabini v. Loura* (1916), 3 Cal. Ind. Acc. Com. 354.

43. *Scott v. O. A. Hankinson & Co.*, — Mich. —, 171 N. W. 489.

44. *In re Simmons*, — Me. —, 103 Atl. 68, 1 W. C. L. J. 984.

45. *In re Chas. C. Logan*, 2nd A. R. U. S. C. C. 244.

was no clear line drawn wherein his authority would cease, his employment of a contractor to clean the building was held to be sufficiently authorized so as to hold the son, even though as principal he was not disclosed.⁴⁶

§ 23. **Employee Doing Incidental Work.**—Some of the acts provide that if employments are incidental to the operation of the usual business of the employer, they are subject to the act. But regardless of whether it is covered by the act it often becomes a pertinent question whether the work in which the employee was injured was incidental to the main purpose of the employer's business and therefore included by the act, or is incidental to a part of one of the employments expressly excluded by the act.

It has been held in Illinois, that the widow of a workman killed while blasting stumps on a township road, was not entitled to compensation because such work was incidental employment in connection with the repair of the road (work not included under the act), and the workman was not an employee within the act, which also excludes employments casual or not in the usual course of the employer's business,⁴⁷ because blasting, while one of the hazardous employments included by the act, was in this case but casual and therefore excluded from the act.

The court said: "The work of dynamiting the stumps was a mere casual or incidental employment in connection with the matter of grading and repairing the road, and the evidence does not show that the road district had ever before used dynamite in connection with road grading at any time, and the evidence clearly shows that the work would only continue for a few hours at most. There was no expectancy, so far as the evidence shows, that dynamite would ever be again used by the district in its road work. In the case of *Aurora Brewing Co. vs. Ind. Bd.*, 277 Ill. 142,

46. *Davis v. Indus. Comm.* — Ill. —, 130 N. E. 333 (1921).

47. *McLaughlin v. Industrial Board*, 281 Ill. 100, 117 N. E. 819; 1 W. C. L. J. 504; *Mattoon Clear Water Co. v. Ind. Com'n. et al.* 291 Ill. 487, 126 N. E. 168, 5 W. C. L. J. 671; *Contra*, see *Lanagan v. Saugerties*, 180 App. Div. 227, 167 N. Y. Supp. 654, 1 W. C. L. J. 675; *State ex rel. City of Northfield v. Dist. Court of Rice Co.*, 131 Minn. 352, 155 N. W. 103, 11 N. C. C. A. 366.

115 N. E. 207, this court held that the Legislature never intended an employee who was engaged for one job lasting only three or four days to be within the terms of the Workmen's Compensation Act, even though the employee had been employed at irregular intervals during several previous years to perform similar work."

In a California case, where workmen were blasting stumps to convert a dairy farm to a fruit farm they were held to be engaged in work incidental to agricultural work and therefore excluded from the benefits of the act. In other words the blasting of stumps was considered part of the usual business of the farmer.⁴⁸

The manufacture of drugs is one of the hazardous employments, which alone are covered by the New York Act. A handy man, employed by such establishment, who also acted as porter and elevator man had occasion to reach into the elevator shaft for a board, in so doing he lost his balance, fell into the shaft and was killed. On the question of whether this incidental work was properly a part of the usual course of the employer's business the court said: "We feel perfectly secure, however, in holding that where, as in this case, an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the practise and characteristic process or operation which has been made the basis of the group in which employment is claimed."⁴⁹

A carpenter fell overboard, and was injured, while repairing a boat owned by the hay and grain merchants by whom he was employed. He was awarded compensation.⁵⁰ An employee of a

48. *Martin v. Russian River Fruit & Land Co.*, 1 Cal. Ind. Acc. Com. (Part II) 18; *Reilly v. Newhall Lumber Co.*, 3 Cal. Ind. Acc. Com. 208.

49. *Matter of Larsen v. Paine Drug Co.*, 218 N. Y. 252, 112 N. E. 725; *Aff'g* 169 App. Div. 838, 155 Supp. 759, 11 N. C. C. A. 327; *Kimbol v. Industrial Acc. Comm.*, 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E, 312; *Lanagan v. Town of Saugerties*, 180 N. Y. App. 227, 167 N. Y. S. 654, 1 W. C. L. J. 675.

50. *Chertkoff v. Schaeffer & Son*, 5 N. Y. St. Dep. 423; *Fields v. Wright et al.* 5 Cal. Ind. Acc. Com. 224.

garbage reduction company drove one of its collecting wagons, but while doing some extra work climbed on the roof of a building to pull down a rope used to hoist fertilizer material he was helping to load, he fell through a skylight and was killed. It was held that he was entitled to compensation, as the injury was received in the course of his employment.⁵¹ Where a chauffeur, waiting in a garage for his master's machine to be repaired, voluntarily and to no useful purpose cranks the engine and is injured, all control and responsibility for the work being out of his hands, it was held that what he did was not at the time incidental to his employment, and he was not entitled to compensation.⁵²

In an Illinois case where a corporation was engaged in general contracting work, including street paving, and contracted with a teaming company to haul stone, an award against the corporation on account of the accidental death of a teamster was affirmed. The court said: The enterprise cannot be considered a mere incident to the general business in which plaintiff in error was engaged. It was the business or enterprise itself. * * * If it was only the hauling of one load of crushed stone by a farmer or business man who was not engaged in construction or contracting work generally, undoubtedly then the proper conclusion would be to hold the hauling of such single load a mere incident to the main business.⁵³

It would appear therefore that if the work being done may properly be within the ordinary expectation or contemplation of the parties as being necessary or proper for the employee to do, to aid in carrying out either directly or indirectly the main purpose or business of the employer, even though the employee steps aside from his usual work to do this unusual or isolated act or work, he should nevertheless receive compensation when injured in such work.⁵⁴

51. *Ross v. Genesee Reduction Co.*, 180 App. Div. 846, 168 N. Y. Supp. 51, 1 W. C. L. J. 683.

52. *De Long v. Krebs*, 1 Cal. I. A. C. Dec. 592.

53. *Parker-Washington Co. v. Industrial Board of Ill.*, 274 Ill. 498, 113 N. E. 976, 14 N. C. C. A. 1079.

54. *Wendt v. Industrial Ins. Comm. of Wash.*, 80 Wash. 111, 141 Pac.

In another Illinois case a company was engaged in the manufacture and sale of ice, and in the sale of coal, coke and wood, and also maintained a horse barn where it kept horses which it used in connection with its business. The deceased, a teamster employed by the company to deliver ice and coal, was kicked by a horse and killed while feeding it. It was contended that the deceased was not engaged in that part of the company's business which could properly be termed extra hazardous and therefore was not under the act. The court said: "Here the duties of the deceased required him to work in and around the plant where the ice was manufactured, and included the loading of ice and the care of the horses in a large stable on the premises of plaintiff in error immediately adjacent to the main ice plant. We cannot see how it can fairly be held that the employment in which the deceased was engaged was not a part of plaintiff in error's business or occupation of manufacturing and selling ice. * * * The men in the building of plaintiff in error where the machinery was located and the ice manufactured were certainly within the act. The workmen around the building and caring for the property were within the act. Those whose duties took them to the plant to take away the product were within the act, and we can reach no other conclusion than that the duties of the deceased were of such a nature, so related to and connected with the occupation of plaintiff in error as to require that plaintiff in error, under the provisions of the workmen's compensation act, shall be held liable for the injury.'⁵⁵

Section 1, of the New Hampshire Act, provides that it shall apply to "work in any shop, mill, factory or other place on, in connection with or in proximity to, hoisting apparatus or machinery propelled or operated by steam or other mechanical power," etc. The plaintiff was injured in constructing a pulp carrier a mile from the defendant's mills. In declaring that the plaintiff

311, 5 N. C. C. A. 790; *Replogle v. Seattle School Dist. No. 1*, 84 Wash. 581, 147 Pac. 196, 8 N. C. C. A. 442; But see *Shafer v. Parke, Davis Co.*, 192 Mich. 577, 159 N. W. 304, 14 N. C. C. A. 1077.

55. *Suburban Ice Co. v. Industrial Board of Ill.*, 274 Ill. 630, 113 N. E. 979, 14 N. C. C. A. 1080.

did not come under the act the court said: "The place where the pulp carrier was being erected was in no way appurtenant to the defendants' mills, and in no sense a part of their manufacturing plant. To hold that building a pulp carrier for the defendants more than a mile from their mills is working in their mills within the meaning of the statute would lead to results never contemplated by the legislature. Under such an interpretation of the statute those engaged for the defendants in felling trees, hauling them from the forest many miles from their mills could be said to be working in their mills."⁵⁶

A Country Club was held liable to pay compensation for the death of an employee who was killed while felling trees on land belonging to the Club, and from the sale of which the Club derived a profit, although the Club was organized for pleasure and not for profit.⁵⁷

§ 24. **Loaned Employees.**—The common-law principle⁵⁸ that an employee lent to a special employer, and who assents to the change, becomes a servant of the employer to whom he is loaned, applies to cases arising under the workmen's compensation act.⁵⁹

In a recent Wisconsin Case the Court said: "When a workman is transferred with his own consent, by an employer to a special employer, the latter may become liable to pay an indemnity when he is in the exclusive control and management of the work in which the injury is received."⁶⁰ But where the employee

56. *King v. Berlin Mills Co.*,—N. H.—, 99 Atl. 289 (1916) 14 N. C. C. A. 1082.

57. *Uhl v. Hartwood Club*, 177 App. Div. 41, 163 N. Y. Supp. 744, Aff'd 221 N. Y. 588, 116 N. E. 1000.

58. *Wyman v. Berry*, 75 Atl. 123, 106 Me. 43; *Wise v. Lillie Sugar Apparatus Mfg. Co.*, 113 Pac. 403, 84 Kan. 86; *W. N. Neill Co. v. Rumpf*, 147 S. W. 910, 148 Ky. 810; *Wolfe v. Mosler Safe Co.*, 139 App. Div. 848, 124 Supp. 541; *Bowie v. Coffin Valve Co.*, 86 N. E. 814, 200 Mass. 571.

59. *Scribner's Case*,—Mass.—, 120 N. E. 350, 2 W. C. L. J. 905; *Bayer v. Bayer*,—Mich.—, 158 N. W. 109; *Burns v. Jackson*, 200 Pac. 80.

60. *Cayll v. Indus. Comm.*,—Wis.—, (1920), 179 N. W. 771, 7 W. C. L. J. 165; *Schweitzer v. Thompson Morrie Co. of N. J.*,—N. Y. App.—, 127 N. E. 904, 6 W. C. L. J. 366.

had no knowledge of the fact that he had been loaned the original employer was liable.⁶¹

Where a miner loaned to another company to assist in extinguishing a fire, and while so engaged was subject to the control of the latter company, it became his employer, even though his wages were not fixed, so that a claim for compensation was properly awarded against it.⁶²

An employer cannot transfer his employee to the employ of another employer so as to constitute the employee a special employee of the latter, without the consent of the one transferred, with the understanding that he is submitting himself to the control of a new master. So where a detective bureau furnished guards to a railroad company during a strike, an employee of the bureau, transferred without his consenting to become an employee of the railroad company, was not a special employee of the railroad within the meaning of the compensation act so as to preclude him from bringing a common-law action for negligence of the railroad company.⁶³

A person to whom an employee is loaned temporarily becomes the employer even though the general employer may have an interest in the special work.⁶⁴

But there is a presumption that, in the management of a machine or appliance belonging to the general employer, the loaned employee is an employee of the general employer.⁶⁵

In a Michigan case it was held that a manufacturing company, which was installing a blow pipe system in another company's plant, was the employer of a man who was under its direction and control, even though he was paid by the other company.⁶⁶

61. *Inmann v. Cochran*, 38 N. J. L. J. 304; *Jackson v. Erie Ry. Co.* 86 N. J. L. 550, 91 Atl. 1035, 6 N. C. C. A. 944.

62. *Tarr v. Hecla Coal Co.*, — Pa. —, (1920), 109 Atl. 224, 5 W. C. L. J. 904; *Kucharuk v. McQueen*, 221 N. Y. 607, 117 N. E. 1073; *De Noyer v. Cavanaugh* 221 N. Y. 273, 116 N. E. 992.

63. *Murray v. Union Ry. Co. of New York City*, — N. Y. A. —, (1920), 127 N. E. 907, 6 W. C. L. J. 365.

64. *Westover v. Hoover*, 129 N. W. 285, 88 Neb. 201, 3 N. C. C. A. 471.

65. *Emach's Case*, 232 Mass. 596, 123 N. E. 86, 4 W. C. L. J. 94; *Modoc Co. v. Indus. Comm.*, 32 Cal. App. 548, 163 Pac. 685, 15 N. C. C. A. 280.

66. *Arnett v. Hayes Wheel Co.*, 201 Mich. 67, 166 N. W. 957, 1 W. C. L. J. 1061, 18 N. C. C. A. 916.

Where A hired two men and the following day directed that one work for his father, the father was liable for injury to the workman notwithstanding the original hiring was done by A.⁶⁷

It has been held however that a caddie for a golf club, paid by the member whom he serves, is an employee of the club and not of the member he might be serving at the time of the accident.⁶⁸

The unauthorized exchange of jobs between two employees will deprive them of their right to compensation.⁶⁹ But where the exchange is authorized, the injured employee may recover from his regular employer.⁷⁰

Where a partnership sublet a portion of their contract on a building to a corporation, and, for the accommodation of the subcontractor, hired a man, who was never informed that he was in the employ of the corporation, the employee when injured may hold either the partnership or the corporation for compensation.⁷¹

The owner of a chartered vessel, and not the charterer, is the employer of the captain of the vessel.⁷²

Where the duties of an employee are of a dual nature, including duties to his general employer as well as to his special employer, and he is injured while acting for his general employer he cannot claim compensation from his special employer when at the time of the injury he had departed from his duties to the special employer. So where a teamster was injured while watering his general employer's horse, during the time he was under

67. *Smith v. Eichelberger*, 176 Ill. App. 231. *Consolidated Tire Works v. Koechl*, 190 Ill. 145.

68. *Claremont Country Club v. Indus. Acc. Comm.*, 174 Cal. 395, 163 Pac. 209, 15 N. C. C. A. 448.

69. *Sherr & Co. v. Indus. A. C.* — Cal. —, 166 Pac. 318.

70. *In re Maroney*, — Ind. App. —, 118 N. E. 134, 15 N. C. C. A. 242.

71. *Scott v. O. A. Hankinson & Co.*, 205 Mich. 358, 171 N. W. 489, 3 W. C. L. J. 759, 18 N. C. C. A. 917.

72. *Norman v. Empire Lighterage and Wrecking Co.*, 2 N. Y. St. Dep. Rep. 480; *Mackinnon v. Miller*, 2 B. W. C. C. 64 Ct. of Sess., 46 Scotch L. R. 299.

the control of the special employer, it was held that he must seek compensation from his general employer.⁷³

§ 25. **Partnership as Employer.**—Few questions arise in reference to partnerships as employers under compensation laws that cannot be decided by reference to the general statutes and decisions, relating to the law of partnership; though there are some questions relating to partnerships under compensation laws which are not so easy of determination. The question has been raised whether a member of a partnership is its employee and entitled to compensation when injured in the course of his employment. In a California case it was decided he was not an employee within the meaning of the compensation act even though at the time of his death he was working under an agreement with the partnership firm, whereby it paid him a stipulated price per day and expenses.⁷⁴ Ordinarily partners and co-adventurers in business do not sustain the relation of employer and employee, on the theory that no one can at once be both.⁷⁵ Where the deceased was employed by a partnership, one of whose members was his father with whom he lived, it was held that he was an employee of the partnership from which compensation might be demanded.⁷⁶

It has been held that an employee who has suffered disability cannot obtain compensation from one member of a partnership on the allegation that the individual defendant was the em-

73. *Pigeon v. Employers Liab. Assn. Corp.*, 216 Mass. 51, 102 N. E. 932, 4 N. C. C. A. 516.

74. *Cooper v. Industrial Acc. Com.* (Cal.), Mar. 6th, 1918, 171 Pac. 684, 1 W. C. L. J. 899; *Ellis v. Ellis & Co.*, 92 L. T. 718; 7 W. C. C. 97; *Reinking v. Aetna Life Ins. Co.*, 3 Cal. Ind. Acc. Com. 82. Held in *Britten v. Britten et al.*, 5 Cal. Acc. Com. 187, that where he received wages irrespective of profits he was an employee. But see *Howard v. George Howard, Inc.* (1916), 9 N. N. S. St. Dep. Rep. 355.

75. *Ellis v. Ellis* (1905), 1 K. B. 324, 7 W. C. C. 97; *Boon v. Quance*, 102 L. T. 443, 3 B. W. C. C. 106; *In re C. E. Cooper*, Vol. 1, No. 7, Bul. Ohio, Ind. Com. p. 180; *Ferranti v. Kennedy*, 1 Conn. Comp. Dec. 196; *Shaw v. D. F. Foley*, 1 Cal. Ind. Acc. Com. (Part II), 629.

76. *McNamara v. McNamara*, 91 Conn. 380, 100 Atl. 31, A 1 W. C. L. J. 296, 15 N. C. C. A. 459; *Rogers v. Rogers*, — Ind. App. —, 122 N. E. 778, 18 N. C. C. A. 918, 4 W. C. L. J. 58.

employer.⁷⁷ A member of a co-partnership working under a sub-contract is an independent contractor, and not an employee of the general contractor.⁷⁸ A partnership contracted with a contractor to install certain machinery, and one of the partners was injured while helping to unload machinery billed to the contractor. It was held that the partner was not an employee of the contractor,⁷⁹ but he was an employee when he received separate pay for such work.⁸⁰

A creditor assumed the management of the business of a partnership for the purpose of securing himself and rehabilitating the firm. It was held that the partnership and not the creditor was the employer of the injured workman.⁸¹ The contrary was held where an assignee for the benefit of creditors who took over the business for the purpose of winding it up and distributing its assets pro rata among all the creditors.⁸²

Where one contracted with a partnership for the use of a team and driver and the partnership sent one of its members and a driver, he was held to be an independent contractor and not an employee of the one who contracted for his services.⁸³

77. *Dupre v. Coleman*, 143 La. 69, 78 So. 241, 1 W. C. L. J. 982. But see *Coady v. Igo*, 91 Conn. 54, 98 Atl. 328, 15 N. C. C. A. 457. Employees of individual partners cannot be added to employees of partnership to make five and bring the partnership under the Act.

78. *Kasovitch v. L. R. Wattis Co.*, 2 Cal. Ind. Acc. Com. 357; But see *Dyer v. James Black Masonry & Contracting Co.*, 192 Mich. 400, 158 N. W. 959; *Rockefeller v. Indus. Comm.* — Utah — (1921) 197 Pac. 1038.

79. *Anderson v. Perew*, 2 Cal. Ind. Acc. Com. 727.

80. *Dyer v. James Black Masonry etc. Co.*, 192 Mich. 400, 158 N. W. 959; Mich. Act amended 1921, Part I, § 7.

81. *Maffia v. L. Aquilino*, 3 Cal. Ind. Acc. Com. 15; *Zanotti Aquilino & Lagomarsino Co.*, 3 Cal. Ind. Acc. Com. 53; *United States Fidelity & Guaranty Co. v. Ind. Acc. Comm. of Cal.* 174 Cal. 616, 163 Pac. 1013, 15 N. C. C. A. 457.

82. *Maffia v. L. Aquilino*, 3 Cal. Ind. Acc. Com. 15. Held not an assignment and partners liable. *United States Fidelity, etc. Co. v. Industrial Acc. Com.* 174 Cal. 616, 163 Pac. 1013.

83. *Sayers v. Girard*, 1 Cal. I. A. Dec. 352. But see *Wood v. Tupper Lake Chemical Co.* (1916), 9 N. Y. St. Dep. Rep. 372.

Where an award was made against a husband and wife in California the award against the wife was dismissed, it being held that she was not a partner in her husband's business.⁸⁴

Where a man entered into a contract of hire with a partnership and thought he was working for the partnership, he was held to be an employee of the partnership, though he was injured while doing work for a subcontractor of the partnership.⁸⁵

§ 26. **Employers of Teamsters.**—When teamsters are performing work directly connected with the business of the owner, no question arises, as they are then the employees of such owner. But where an owner of teams and wagons contracts with a third party to furnish team and teamster for a stipulated price per day for both to the third party, and the owner pays the teamster, but the third party exercises general control over him with reference to his work but with no authority to discharge him from his general employment with the owner, it has been held by one line of decisions that the teamster is the employe of the owner and can obtain compensation alone from him, the court in one case holding the act "inapplicable to any relation of master and servant as generally understood at common law, other than that arising out of the contract between the master and the servant, whereby the servant engages to work for the master, and the master on his part engages to pay the servant for such work; in other words, that it is inapplicable to a condition of things where a servant employed by a master directly is required, as part of his contract of employment, to work for some other person for a compensation payable not to the servant but to the immediate master."⁸⁶

84. *Lezaa v. Ind. Comm.*, 170 Wis. —, 175 N. W. 87, 5 W. C. L. J. 338.

85. *Scott v. O. A. Hankinson & Co.*, 205 Mich. 353, 171 N. W. 489, 3 W. C. L. J. 759.

86. *Rongo v. Waddington & Sons Inc. et al.*, 87 N. J. L. 395, 94 Atl. 408, 9 N. C. C. A. 402; *Jones v. Liverpool*, 14 Q. B. D. 890; *Kirkpatrick v. Industrial Acc. Comm.*, 31 Cal. App. 668, 161 Pac. 374; *Kellogg v. Church Charity Foundation of L. I.*, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481n, 3 N. C. C. A. 444; *Pigeon v. Employers Liability Assurance Corporation*, 216 Mass., 51, 102 N. E. 932, 4 N. C. C. A. 516; *Dale v. Saunders*, 218 N. Y. 59, 112 N. E. 571, 15 N. C. C. A. 454; *In re Clancy*,

Another line of decisions hold that the third party is the special employer from whom alone the teamster can obtain compensation. The court in one of these cases remarked: "The principles of law which control in this class of cases are quite well settled. A servant in the general employment of one person, who is temporarily loaned to another person to do the latter's work, becomes, for the time being, the servant of the borrower, who is liable for his negligence. But, if the general employer enters into a contract to do the work of another, as an independent contractor, his servants do not become the servants of the person with whom he thus contracts, and the latter is not liable for their negligence."⁸⁷ The court in this case, also approves the doctrine of the case of *Schmedes v. Deffaa*, 214 N. Y. 675; 108 N. E. 1107, rev'g 153 App. Div. 819, 138 Supp. 931, in which a livery stable keeper who had an order from an undertaker to furnish carriages for a funeral and not having a sufficient number of his own applied to another liveryman for an additional carriage and driver.* The second liveryman sent a carriage and driver as requested. The court remarked that this clearly was

228 Mass. 316, 117 N. E. 347, 1 W. C. L. J. 87, 15 N. C. C. A. 454; *Hunt v. N. Y., N. H. & H. R. R.*, 212 Mass. 102, 98 N. E. 787, 40 L. R. A. N. S. 778; *Corliss v. Keown*, 207 Mass. 149, 93 N. E. 143; *Waldock v. Winfield*, 2 K. B. 596; *Hogan's Case*, — Mass. —, (1920), 127 N. E. 892, 6 W. C. L. J. 321; *Golden & Boter Transfer Co. v. Brown & Schler Co.*, — Mich. —, (1920), 177 N. W. 202, 6 W. C. L. J. 58; *State ex rel. B. M. Gilmore Co. v. District Court of Hennepin Co.*, — Minn. —, (1920), 179 N. W. 216, 6 W. C. L. J. 697.

87. *Hartel v. T. H. Simonson & Son. Co.*, 218 N. Y. 345, 113 N. E. 255; *O'Neill v. Sperry Engineering Co.*, 1 Conn. Comp. Dec. 387; *Gimber v. T. P. Kane Co.*, 2 N. Y. St. Dep. Rep. 475; *Nolan v. Cranford Co.*, 4 N. Y. St. Dep. 337; *Christiansen v. McLellan*, 133 Pac. 434, 74 Wash. 318; *Scribners Case*, 231 (Mass.) 132, 120 N. E. 350, 2 W. C. L. J. 905; *Arnett v. Hayes Wheel Co.*, 201 Mich., 67, 166 N. W. 957, 1 W. C. L. J. 1061; *Dale v. Hyal Const. Co.*, 175 N. Y. App. Div. 284, 161 N. Y. S. 540, 15 N. C. C. A. 454; *Nolan v. Cranford Co.*, 219 N. Y. 581, Aff'g. 171 N. Y. App. Div. 959, 155 N. Y. S. 1128; *Schweitz v. Thompson & Morris Co. of N. J.*, — N. Y. App. —, (1920), 127 N. E. 904, 6 W. C. L. J. 365; *In re Willis Hainer*, 3rd A. R. U. S. C. C. p. 97. Contra, see *O'Boyle v. Parker Young & Co.*, — Vt. —, 112 Atl., 385, (1921).

a case where the first liveryman procured additional facilities for doing his own work, and it was held that the first liveryman was liable for the driver's negligence.

Other decisions hold that the teamster may claim and obtain compensation from either or both, the owner, his general employer, or the third party, his so-called special employer in whose work the teamster is injured.⁸⁸

Again it has been held that where the teamster sues the third party, his so-called special employer, for damages at common law on account of the latter's negligence the court will dismiss the case for lack of jurisdiction for the reason that the teamster must make his claim if any under the Compensation Act.⁸⁹

There is likewise considerable conflict in the decisions in cases where the owner of teams drives one of them himself. It being held in some jurisdictions that he is the employee of the person thus employing him and his teamsters,⁹⁰ but he himself was the employer of his teamster.⁹¹ In other jurisdictions it is held that he is not an employee, but an independent contractor and also a casual employee.⁹² It has also been held that a workman is not an employee of the foreman of a general employer just because at

88: *De Noyer v. Cavanaugh*, 221 N. Y. 273, 116 N. E. 992, *Aff'g*, 177 N. Y. App. Div. 939, 163 N. Y. Supp. 1114, 114 N. E. 1074; *Employers' Liability Assur. Corp. v. Ind. Acc. Comm. of Cal.*, 177 Pac. 273, 3 W. C. L. J. 407.

89. *Lee v. Cranford Co.*, 182 App. Div. 190, 169 N. Y. S. 370, 1 W. C. L. J. 854, 16 N. C. C. A. 406.

90. *Walters v. McGovern*, 4 N. Y. St. Rep. 361; *Rider v. Little Co.* (Mich.) Ind. Acc. Bd. Apr. 1913; *Mantz v. The Faulk Co.*, Fourth Annual Rep. (1915) Wis. Ind. Com. 15; *Seward v. Sunset Trading Co.*, 3 Cal. Ind. Acc. Com. 49; *Fiorio v. Ferrie*, 1 Conn. Comp. Dec. 459; *Tuttle v. Emburg-Martin Lumber Co.*, 192 Mich. 385, 158 N. W. 875; *Centrellos Case*, 232 Mass. 456, 122 N. E. 560, 3 W. C. L. J. 740.

91. *Stevens v. Tittle*, 2 Cal. Ind. Acc. Com. 145. But see also, *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 Pac. 721.

92. *Cheevers v. Fidelity & Dep. Co.*, 1 Mass. Ind. Acc. Bd. 365, 219 Mass. 244, 106 N. E. 861; *Ryan v. County Council of Tipperary (S. R.)* 48 Ir. L. T. 69, 5 B. W. C. C. 578; *See v. Leidecker*, 152 Ky. 724, 154 S. W. 10; *Little v. Hackett*, 116 U. S. 379, 29 L. Ed. 652. In *Chisholm v. Walker* (1909), 46 Scotch L. R. 24, 2 B. W. C. C. 261; *Sayers v. Girard*, 1 Cal. I. A. C. 352.

the time he was injured he happened to be driving a team that was owned by the foreman.⁹³

"The relator's husband, Charles Jacobson, was employed by Minneapolis. He was driving a sprinkling wagon. He furnished his team and the running gears of the wagon. The city furnished the tank. He kept the sprinkler in the rear of his house and stabled his horses in his barn on his premises and fed and cared for them at his own expense. He worked eight hours a day commencing at 8, and quitting at 5, with an hour off at noon, and received for his services and the use of his team and wagon \$6 per day. On the day of his injury he had finished his day's work, and gone home and stabled and fed his horses, and had eaten his supper. After supper he went to the stable to doctor one of his horses which had a sore neck. While he was so engaged the horse killed him. * * * "The facts stated give no right to compensation. The plaintiff's work for the day was done. He was not to do service for the city until the next morning. The horses were his and he fed and cared for them and furnished them and his wagon ready for work at a definite time. The accident did not arise out of his employment any more than would an accident which came while he was repairing his wagon or while doing other work in preparation for his next day's work for the city. The relator cites cases where a teamster, injured while caring for his horses after their work for the day was done was allowed compensation. *Smith v. Price*, 168 App. Div. 421, 153 N. Y. Supp. 221; *Costello v. Taylor*, 217 N. Y. 179, 111 N. E. 755; *Suburban Ice Co. v. Industrial Board*, 274 Ill. 630, 113 N. E. 979. They involve situations where a teamster was doing work for his employer in the care of his employer's team and as a part of the work for his employer."⁹⁵

Claimant a garbage collector was injured as a result of his horses becoming frightened while he was taking his horses and equipment back to the barn to his immediate employer. Claim-

93. *Yolo Water & Power Co. v. Ind. Acc. Com.* 35 Cal. App. 14, 168 Pac. 1146.

95. *State ex rel. Jacobson v. Dist. Court of Hennepin Co.*, 144 Minn. 259, 175 N. W. 110, 5 W. C. L. J. 288.

ant's immediate employer Boadi was not subject to the provisions of the compensation act. In holding that he was entitled to compensation for an injury arising out of and in the course of the employment the court said: "Boadi was not subject to the provisions of the Compensation Act, and that act provides (Stats. sec. 2394—3) that an employer subject to the provisions of the act shall be liable for compensation to an employee of a contractor or subcontractor under him who is not subject to the act in any case where such employer would have been liable for compensation if such employee had been working directly for such employer. The city of Milwaukee is subject to the provisions of the act, and this provision plainly made the claimant here the employee of the city while carrying out Boadi's contract with the city to the same extent that he was an employee of Boadi so far as the purposes of the Compensation Act are concerned. So there can be no doubt of the existence of the relation of employer and employee within the meaning of the Compensation Act at the time of the accident. That the claimant was then performing service growing out of and incidental to his employment seems equally beyond doubt. He was taking the garbage collection equipment, part of which belonged to the city, to its usual place of storage and care so that it should be ready for the work of the following day. We can hardly conceive of a service which grows out of and is incidental to his employment as a garbage collector if this is not such a service."⁹⁶

Where a garbage collector for a city, hired teams and teamsters and sent them out to collect garbage for the city, and one of the teamsters was injured while returning to his general employer's barns after completing his day's work for the city, the court held that he must look to his general employer, and not the city, for compensation, saying: where a horse and wagon has been let by the general employer into the service of another, the driver is subject to the control, and therefore is the agent

96. *City of Milwaukee v. Fera* (1919) 174 N. W. 926, 5 W. C. L. J. 336; *In re Cornerford*, 229 Mass. 573, 118 N. E. 900, 1 W. C. L. J. 793.

of his general employer as to the care and management of the horse.⁹⁷

§ 27. **Employer of Less than Stated Number of Employees.**—The following provision with slight variations is phrasiology and number of employees is typical of nineteen American Compensation Acts: "If the employer has less than five employees regularly employed in his business the act . . . shall not apply to such employment unless such employees and their employers voluntarily elect in the manner herein specified to be bound by this act."

Changing conditions in an employers business makes it difficult of determination at times whether an employer, has five or more employees regularly employed in his business, and therefore under the act, or less than five and not under the act. It has been held that the employees of a partnership could not be added to the number of the employees of an individual member of the partnership, so as to bring the individual member and his employees under the act;⁹⁸ that musicians furnished by a leader, twice each week, to play in an amusement park, the leader stipulating the amount of compensation they were to receive, were regular employees of the park and could be counted in determining whether the employer had five or more;⁹⁹ that the phrase "having regularly less than five employees" refers to the number of employees actually on a job, or in the service of an employer at the time of the injury;¹ that an employer who endeavors to evade liability under the act by temporarily loaning one of his employees, so he has less than five will still be considered under the act;² that a farmer who does not regularly

97. *Mackey v. City of New York*, 184 N. Y. S. 495 (1920), 7 W. C. L. J. 117.

98. *Coady v. Igo*, 91 Conn. 54, 98 Atl. 328; *Sullivan v. Fitzgerald*, Conn. Comp. Dec. Oct. 26, 1916.

99. *Boyle v. Mahoney & Tierney*, 92 Conn. 404, 103 Atl. 127, 1 W. C. L. J. 937, 18 N. C. C. A. 905.

1. *Garde v. Chaplin*, 1 Conn. Comp. Dec. 607; *Regnier v. Rand*, 98 N. H. 108 Atl. 810, 5 W. C. L. J. 559.

2. *Grischuck v. S. Borden & Co.*, 1 Conn. Comp. Dec. 633.

employ four or more men is not an employer, within the meaning of the Wisconsin Act, because he temporarily, at more or less temporarily recurring times, employed four or more men for specific work;³ that a corporation which owns and operates a saw mill, which is not in operation on all the working days of the year, but when in operation requires five or more employees to operate it, is an employer having regularly five or more employees, within the meaning of the Ohio Act.⁴

While it has been held that where a coal wagon driver hires a passerby to help him move his mired wagon, the passerby who was injured in this work was entitled to compensation from the employer of the coal wagon driver, in that his work was part of the usual business of the employer,⁵ but he could not properly be counted and considered as the fifth employee or as one "regularly employed" in the employer's business, so as to bring the employer under the act, when he had but four other employees.

Whether officers of a corporation could be counted to make up the required five or more employees within the meaning of the act would depend on the facts of the particular case, whether they were actually regularly employed in the usual course of the business of the corporation. Assuming for the sake of the example that an act is limited in its application to employers of five or more employees. The fact that an employer regularly employed six men in his usual business, two of who rejected the act, would not in the author's opinion, exempt the employer from the operation of the act as one who has less than five employees, though if an employer has four men employed in his usual business and employs another whose average annual earnings exceed three thousand dollars or other stated amount mentioned in several acts as exempting an employee from its operation, the employer would not then, according to the language of some acts, be presumed to be under them, as a person whose average annual earnings exceeds the stated amount, is as a rule

3. *Kelly v. Haylock*, 163 Wis. 326; 157 N. W. 1094; 11 N. C. C. A. 382.

4. *Clements v. The Columbus Saw Mill Co.*, 1 Bul. Ohio Ind. Comm. 161.

5. *State v. Ramsey & Co.*, 138 Minn. 416, 165 N. W. 268.

not considered an employee for the purposes of the acts, and the employer would not have five employees within the meaning of the act, as for example § 8 of the North Dakota Act, 1921. In the determination of this question it is, however, necessary to examine carefully the specific provisions of the various acts.

In the determination of the question of whether a city lighting plant in Kansas employed the required number of men to bring it within the act it was held that the required number of fifteen could not be made up by including mere clerical employees in the office of the city clerk. The court said: "It is not within the letter or spirit of this statute that clerical employes like the clerk and stenographer in the city clerk's office should be included within the list of those engaged in the hazardous enterprise of operating an electric light and waterworks system."⁷

An employer of less than five employees will not come under the operation of the act by reason of the fact that he is engaged in drilling an oil or gas well since the oil or gas well is not a mine within the meaning of the provision extending the effect of the act to mines irrespective of the number of workmen employed.⁸

Where it appears that a company, which is being sued for personal injuries by its servant, employs more than five servants, it is subject to the Texas Workmen's Compensation act, whether as a matter of fact it had really become a subscriber or not, and consequently cannot plead assumption of risk.⁹

Where a brick manufacturer operated a silica bed in connection with his brick business, and who employed more than four employees, he was liable for the death of a silica miner, although fewer than the stated number of employees were engaged at the silica bed, since more than the stated number were

7. *Udey v. City of Winfield*, 97 Kan. 279, 155 Pac. 43, 14 N. C. C. A. 943.

8. *Hollingsworth v. Berry*, — Kan. —, (1920), 192 Pac. 763, 6 W. C. L. J. 676.

9. *Wichita Falls Motor Co. v. Meade*, — Tex. Civ. App. —, 203 S. W. 71, 2 W. C. L. J. 135.

regularly employed in the same business or in common employment.¹⁰

A teamster having more than five employees comes within the act notwithstanding all of the teamster's employees were not working at the same job but worked on various different jobs.¹¹

§ 28. **Regularly Employed and Usual Business of Employer.**—The phrase "regularly employed in the employer's business" and the phrase "usual business of the employer" appears in connection with slightly varying phraseology in the compensation act of many states.

"There are few words more current in our speech than the word 'business,' few that include a greater variety of subjects and yet none which in popular speech, have greater or more marked singleness in denotement. When one's business is the subject of common speech, no one can be in doubt as to the reference. It would be a very exceptional person—we do not know how to otherwise describe him—who would not understand that the reference is to be the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain. These objects are necessarily implied when one's business is spoken of. Eliminate livelihood and gain, and it is no longer business, but amusement, which no one confounds with business. What we have said as to the popular understanding of the word business is just what Webster defines it, 'Some particular occupation or employment habitually engaged in for livelihood or gain.'

In the case quoted from, the defendant, a married woman, resided with her husband in a house which she owned, and in the course of remodeling the house she employed the claimant to do some plastering, which would require about two days to complete. Claimant had been at work a few hours, when he was injured by the fall of a scaffold. In holding that defendant was not en-

10. *Indus. Comm. v. Funk*, — Colo. —, (1920), 191 Pac. 125, 6 W. C. L. J. 436.

11. *Colbourn v. Nichols* — Del. —, (1920), 109 Atl. 882, 6 W. C. L. J. 140.

gaged in 'business,' as contemplated by the Compensation Act, the court further said: "The points of difference between the employment the defendant was engaged in and the business which is contemplated by the act and understood in common parlance, are so marked that the two cannot be confounded; one cannot be the equivalent of the other. The defendant's employment was not in any way dependent on patronage; it had not for its object profit or gain, but simply her own personal gratification and comfort; it was not regular or habitual, but it terminated with the completion of the one thing that engaged her attention at the time, and there is not the slightest indication that she contemplated resuming or doing a life service for another, nor indeed that she had ever attempted anything of the kind before."¹²

"The term 'business,' in common parlance, means that employment which occupies the time, attention and labor."¹³

Referring to the word "business" as used in the Minnesota Act, the Supreme Court of that State said: "Assuming that the lease obligated defendant to erect a shelter for his tenant's stock, or that he had voluntarily agreed so to do, we may say, in a certain sense, that the erection became his business or duty. But that cannot be the meaning of the word 'business' in this statute. It must have the same general significance with respect to the work or calling of the employer as the words 'trade, profession, or occupation,' hence must refer to the employer's ordinary vocation, and not to every occasional, incidental, or insignificant work he may have to do. When we speak of a person's trade or profession, we generally refer to that branch of the world's activities wherein he expends his usual everyday efforts to gain a livelihood."¹⁴

In constructing a sewer, a city is not engaged in an enterprise involving any element of gain or profit, and such work is not within the Kansas Act on that account.¹⁵

12. *Marsh v. Groner*, 258 Pa. 473, 102 Atl. 127, 2 W. C. L. J. 134.

13. *Stephenson v. Primrose*, 8 Porter (Ala.) 155, quoted with approval in *Adam v. Musson*, 37 Ill. App. 501.

14. *State ex rel. Lennon v. District Court of Douglas County*, 138 Minn. 103, 164 N. W. 366.

15. *Roberts v. Ottawa*, 101 Kan. 228, 165 Pac. 869; *Redfern v. Eby*, — Kan. —, 170 Pac. 800.

The harvesting of ice by a farmer for farm purposes, and not as a business or for pecuniary gain, is not within the New York Act.¹⁶

The term "gain or profit," as used in the Nebraska Act, means pecuniary gain.¹⁷

Considering the meaning of the term "usual course," the Supreme Court of Minnesota has said: "The words 'usual course' must be regarded as more restrictive than the language employed in the Connecticut and English Acts. This is the view taken by the California courts in *London and Lancashire, etc., Co. v. Industrial Comm.*, 173 Cal. 642, 161 Pac. 2, and *La Grande Laundry Co. v. Pillsbury*, 173 Cal. 177, 161 Pac. 988. * * * The Supreme Court of Illinois, in construing the clause 'the usual course of trade, business, profession, or occupation of the employer,' in *Uphoff v. Industrial Comm.*, 271 Ill. 312, 111 N. E. 128, L. R. A. 1916E, 329, held that an injury received by a workman hired by a farmer to erect a broom corn shed on his farm was not received in the usual course of business of the employer. The Illinois Act differs from ours, in that an employee is excluded from the benefits of the law if the employment is casual or if the injury did not occur in the usual course of the employer's trade, etc. But the meaning of the latter clause is not affected by the conjunction, which serves merely to show the relation to what precedes."¹⁸

One employed by a paper bag company to install an engine, was not within the New York Act, as the employer was not engaged in the business of installing machinery.¹⁹ The owner of a hotel

16. *Mullen v. Little*, 186 App. Div. 169, 173 N. Y. Supp. 578.

17. *Ray v. School Dist. of Lincoln, in Lancaster County, Neb.* —, (1920) 181 N. W. 140; *Rooney v. City of Omaha*, — Neb. —, (1920), 181 N. W. 143; *Allen v. State*, 173 App. Div. 455, 160 N. Y. S. 85; *Redfern v. Eby*, 102 Kan. 484, 170 Pac. 800; *Gray v. Board of Comm. of Sedgwick Co.*, 101 Kan. 195, 165 Pac. 867, L. R. A. 1918F, 182; *Sexton v. Pub Service Comm.* 180 App. Div. 111, 167 N. Y. S. 493.

18. *State ex rel. Lennon v. District Court of Douglas County*, 133 Minn. 103, 164 N. W. 366.

19. *McNally v. Diamond Mills Paper Co.*, 178 App. Div. 342, 164 N. Y. Supp. 793; *Dose v. Moekle Lithographic Co.*, 179 App. Div. 519, 165 N. Y. Supp. 1014.

is not pursuing his business within the meaning of the Compensation Act, when he causes rooms to be occasionally painted and decorated, though it is usual to have work of that nature done from time to time.²⁰

A foreman constructing a cottage for employees of a large corporation constantly employing carpenters on its buildings was held to be employed in the "usual course" of the business of the employer.²¹ Where an employee was engaged in trimming trees for his employer, an electric company, under directions of the company's agent, which he had been hired to do, the work was held not to be casual or outside the usual course of the trade, business, profession or occupation, though the company may have no interest in trimming the particular tree on which the employee was working at the time of the injury.²² An employee injured while repairing a clamshell dredge, which his employer intended to sell was not injured in the course of his employers business of leasing roadmaking machines.²³ Though a man employed for an emergency job, loading ice upon a refrigerator car, the work to last a few hours, is a casual employee, he is within the protection of some acts where the work is the regular business of the employer.²⁴

Employments which are both "casual and not incidental to the operation of the usual business of the employer" are not compensable. As where a machinist was hired by a farmer to re-

20. *Holbrook v. Olympia Hotel Co.*, 200 Mich. 597, 166 N. W. 876, 1 W. C. L. J. 1076; *La Grande Laundry Co. v. Pillsbury*, 173 Cal. 777, 161 Pac. 988; See *Walker v. Ind. Acc. Comm.*, 177 Cal. 737, 171 Pac. 954, 2 W. C. L. J. 29.

21. *Miller v. Ind. Acc. Comm.*, 32 Cal. App. 250, 162 Pac. 651.

22. *In re Howard*, 218 Mass. 404, 105 N. E. 636.

23. *Stanbury v. Ind. Acc. Comm.*, 36 Cal. App. 68, 171 Pac. 698, 1 W. C. L. J. 925

24. *Paul v. Nikkel*, 1 Cal. I. A. C. Dec. 648, 11 N. C. C. A. 375; *Shouler v. Greenburg*, 1 Cal. I. A. C. Dec. 146; *Cowles v. Alexander & Kellogg*, 2 Cal. I. A. C. Dec. 615; *English v. Cain*, 2 Cal. I. A. C. Dec. 376; *McDermott v. Fanning*, 3 Cal. I. A. C. Dec. 14; *Brain v. Elsfelder*, 2 Cal. I. A. C. Dec. 30; *Walker v. Ind. Acc.* 177 Cal., 737, 171 Pac., 954, 2 W. C. L. J. 29; *Johnston v. Monasterevan General Store Co.*, (1908), 42 Irish L. T. 268; 2 B. W. C. C. 183; *Blyth v. Sewell*, (1909), 2 B. W. C. C. 476.

pair a tractor used in plowing and was injured before he had finished the work;²⁵ or where a carpenter was injured while constructing a small chicken house on land being set out to lemon trees, the business of the employer being horticulture and the job being finished within four days;²⁶ where a rooming-house keeper employed a plasterer for a period of less than one week to plaster certain rooms in the house the employment was considered both casual and not in the usual course of the business of the employer.²⁷ A retired physician conducted a farm for profit. The swaying of some trees shook the roots and thereby the wall of a building on his property. He employed a man to top the trees. It was held, that it was for the purpose of the employers trade or business, and therefore under the act.²⁸

The fact that the cause requiring the employment is unusual and extraordinary does not prevent the employment from being in the usual course of the employer's business as where a rancher hires men to fight a fire to save the grass on his range,²⁹ or an automobile mechanic who is present at a race on Sunday to repair his employer's cars if necessary,³⁰ or the fact that the employer was injured in the construction of a building, which was being constructed to house coal, the handling of which was to be

25. Maryland Casualty Co. v. Pillsbury, 172 Cal. 748, 158 Pac. 1031; Roberts v. Indus. Acc. Comm., — Cal. —, 1921, 197 Pac. 978.

26. Brockman v. Sheridan, 2 Cal. I. A. C. Dec. 1061; Sutton v. Rabinowitz, 5 Cal. Ind. Com. Rep. 29; Geller v. Rep. Novelty Works, 168 N. Y. S. 263, 180 App. Div. 762.

27. Augustine v. Cotter, 2 Cal. I. A. C. Dec. 49; Trenholm v. Hough, 1 Cal. I. A. C. Dec. 260; Casterlotts v. McDonnell, 1 Cal. I. A. C. Dec. 351; Blood v. Ind. Acc. Com. of Colip, 157 Pac. 1140; Holbrook v. Olympia Hotel Co., 200 Mich. 597, 166 N. W. 876, 1 W. C. L. J. 1076; Solomon v. Bonis (N. Y.), 168 N. Y. S. 676, 1 W. C. L. J. 687.

28. Cotter v. Johnson, 45 Ir. L. T. 259, 5 B. W. C. C. 568; Tombs v. Bomford, 5 B. W. C. C. 338; Thompson v. Twiss, 90 Conn. 444, 97 Atl. 328; Lyman v. Lobu and Barrow, 5 Ind. Com. Cal., 46; Evans v. Bay City Garage Corp., 5 Cal. Ind. Com., 122; Smyth v. Smyth, 5 Cal. Ind. Comm., 94; Hardweck v. Armstrong Holding Co., 5 Cal. Ind. Com., 8.

29. Mazzine v. Pac. Coast Ry., 2 Cal. I. A. C. Dec. 758.

30. Frint Motor Car Co. v. Ind. Comm., — Wis. —, 170 N. W. 285, 3 W. C. L. J. 399.

undertaken in addition to the employer's regular course of business.³¹

The California, Connecticut, Iowa, Minnesota, British and Missouri acts are alike in that a casual employee may be under the act if his work is part of the usual business of his employer, but if both casual and not in the usual business of the employer the employee is not under the act. The court in a Minnesota case said: "The language of the statute leaves no room for construction. Though casual, if the employment is in the usual course of the business of the employer, the compensation act applies. The Minnesota Act is in this respect modeled on the British Workmen's Compensation Law, which has been similarly construed . . . Part of the business of a municipal corporation is the improvement and repair of its public streets. Respondent, when injured, was an employee of the relator and engaged in this work. The compensation act applies."³²

One employed to clean house in a large lodging house was held to be engaged in the usual course of business, though the employment was casual. The court said, "But the intermittent character of the employment is not of itself sufficient to exclude it from the purview of the statute, section 14 does not except employments that are casual only but those that are both casual and not in the usual course of the business."³³

The acts of some of the states provide that if the employment is "casual or not in the trade or business of the employer" it is exempted. In these jurisdictions, it is held that if an employment is casual, that alone excludes it from the act and the fact that it is in the usual course of the employer's business is im-

31. State ex rel. Lundgren v. Dist. Court Washington County, 141 Minn. 83, 169 N. W. 488, 3 W. C. L. J. 159, 18 N. C. C. A. 139.

32. State ex rel. City of Northfield v. Dist. Court of Rice Co., 155 N. W. 103, 11 N. C. C. A. 366; State v. Ramsey Co., 138 Minn. 416, 165 N. W. 268, 1 W. C. L. J. 642; Hill v. Begg, 2 K. B. 802, 1 B. W. C. C. 320; Cotter v. Johnson, 5 B. W. C. C. 568; Smith v. Buxton, 84 L. J. K. B. 697, 11 N. C. C. A. 383; But see McLoughlin v. Ind. Acc. Com., 34 Cal. App. 739, 168 Pac. 1065, 1 W. C. L. J. 497.

33. Walker v. Ind. Acc. Comm. 177 Cal. 737, 171 Pac. 954, 2 W. C. L. J. 29, 18 N. C. C. A. 140.

material,³⁴ or if it is not in the usual course of the employers business it is immaterial whether or not it is casual.³⁵

A carpenter employed in the construction of a silo upon a dairy farm was held to be employed in dairy labor within the meaning of the California act, and such labor was in the regular course of the employer's business.³⁶

The owning and renting of houses as an investment is not a "business" within the meaning of the California act.³⁷

The owner of a department store, who employs a number of carpenters regularly about the store and maintains a carpenter shop in the building, while engaged in a non hazardous business in the conduct of the store, is in so far as the carpenters are concerned, conducting a hazardous business and they are entitled to compensation.³⁸

§ 29. Casual Employments and Regularly Employed in Usual Business of Employer.—There are few states whose acts do not exclude casual employment. The term casual employment, when it appears in the act in the conjunctive with "usual business of the employer" is not as significant and is not the subject of so much contention and varying construction as has arisen over it in those states where casual employments are exempted from the compensation act, regardless of whether or not they are in the usual course of the employer's trade or business. Under the

34. *King's Case*, 220 Mass. 290, 107 N. E. 959; *In re, Gaynor*, 217 Mass. 86, 104 N. E. 399. L. R. A. 1916A, 363 and note; *Sabella v. Brazillere*, 86 N. J. L. 505, 91 A. 1032; *Baer's Exp. etc., Co. v. Ind. Bd.*, 282 Ill. 44, 118 N. E. 412, 1 W. C. L. J. 512; *Western Union Tel. Co. v. Hickman (C. C. A.)* 248 Fed. 899, 2 W. C. L. J. 8; *Thede Bros. v. Ind. Comm. (Ill.)* 3 W. C. L. J. 242, 121 N. E. 172, *Nebr.* 3656, § 106.

35. *Packett v. Moretown Creamery Co. (Va.)* 99 Atl. 638; *Walker v. Ind. Acc. Com.*, 177 Cal. 737, 171 Pac. 954; *Shafter Estate Co. v. Ind. Acc. Com. of Cal.*, 166 Pac. 24; *Fields v. Wright, et al.*, 5 Cal. Ind. Comm. 224.

36. *Globe Indemnity Co. v. Ind. Acc. Comm.*, — Cal. —, 187 Pac. 452, 5 W. C. L. J. 486.

37. *Lauzier v. Ind. Acc. Comm.*, — Cal. App. —, 185 Pac. 870, 5 W. C. L. J. 356.

38. *Alterman v. A. I. Namm & Son*, 190 N. Y. App. Div. 76, 179 N. Y. S. 584, 5 W. C. L. J. 426.

former type of act the important question to determine is whether the particular employment is in the course of the employer's business. If it is, it is covered by the act and it is immaterial whether or not the employment is casual. The construction that has been placed upon this term in various jurisdictions will be of some value here in that it is in a sense the antonym of the phrase "regularly employed," as used in many acts.

Its construction will therefore throw some light on this latter phrase that will assist in determining whether an employer has five or more employees "regularly employed" and is under the act, or whether some of his employees are casual so that the total number of his properly to be counted employees is less than five. Webster defines "casual" as "happening without design and unexpectedly, coming without regularity, occasional." It is defined in a New Jersey decision as follows: "The ordinary meaning of the word 'casual' is something which happens by chance and an employment is not casual—that is, arising through accident or chance—where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period."³⁹

As illustrative of the distinction between the wording of the acts in respect to casual employment, under the Massachusetts Act no one whose employment is "casual" can recover compensation, while, under the British Act, and all acts containing similar provisions, one whose employment is "of a casual nature" comes within the acts, provided it is for the purpose of the employer's

39. *Sabella v. Brazelerio*, 86 N. J. L. 505, 91 Atl. 1032, 6 N. C. C. A. 953. See, also, *Dyer v. James Black Masonry & Contracting Co.*, 192 Mich. 400, 158 N. W. 959; *Dewhurst v. Mather*, 2 K. B. 754, 1 B. W. C. C. 328; *Aurora Brewing Co. v. Ind. Board*, 277 Ill. 142, 115 N. E. 207; *Chicago G. W. Ry. v. Ind. Com.*, 284 Ill. 573, 120 N. E. 508, 18 N. C. C. A. 132, 3 W. C. L. J. 15; *Carter v. Industrial Acc. Comm.*, 34 Cal. App. 439, 168 Pac. 1065, 1 W. C. L. J. 497; *Sales v. Abbott W. C. & Ins. Rep.* (Eng.) 114 L. T. N. S. 819, 9 B. W. C. C. 333; *Hill v. Begg*, (1908), 2 K. B. 802, 77 L. J. K. B. 1074, 99 L. T. 104, 24 T. L. Rep. 711, 1 B. W. C. C. 320; *Thompson v. Twiss*, 99 Conn. 444, 97 Atl. 328; *Bridger v. Lincoln Feed & Fuel Co.*, — Neb. —, (1920), 179 N. W. 1020, 7 W. C. L. J. 211; *Thede Bros. v. Industrial Comm.*, 285 Ill. 483, 121 N. E. 172; *Gaynor's Case*, 217 Mass. 81, 4 N. C. C. A. 502.

trade or business. In ascertaining the meaning of the term casual as used in the Massachusetts and similarly worded acts the determinative point is the contract of service, while under those acts patterned after the British act the determinative point is the nature of the service rendered.⁴⁰

It has been held that a carpenter hired temporarily by a laundry company, and killed while repairing the house of a stockholder, was a casual employee and not employed in the usual business of the company and his widow was not entitled to compensation;⁴¹ that a firm of caterers, who did not have any regular waiters in their employ but engaged men who followed that occupation as the occasion arose were not liable for compensation to a waiter injured in their employ, because the employment was casual and not periodic and regular;⁴² that where a teamster with his horse and wagon is hired for no fixed duration of time and for no specific job, but only when called upon, the employment is casual;⁴³ that a railway section hand, procured to assist in fighting fire on a ranch, was not engaged in the usual course of the business of the ranch owner;⁴⁴ that employment of a window cleaner, at irregular intervals, to clean the windows of a dwelling house, although the same person may have been engaged, when required for a period of some years, is casual employment;⁴⁵ that the employment was casual where a carpenter,

40. *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328, L. R. A. 1916E, 506; *Scully v. Industrial Comm.*, 284 Ill., 567, 120 N. E. 492, 3 W. C. L. J. 30, 18 N. C. C. A. 136; *State Acc. Fund v. Jacobs*, — Md. —, 106 Atl. 255, 4 W. C. L. J. 91; *Gaynor's Case*, 217 Mass. 86, 104 N. E. 339.

41. *La Grande Laundry Co. v. Pillsbury*, 173 Cal. 77, 161 Pac. 988. *Carnahan v. Mailometer Co.*, — Mich. —, 167 N. W. 9, 1 W. C. L. J. 1045, 16 N. C. C. A. 882.

42. *Gaynor Adm'r etc. v. Standard Accident Ins. Co.*, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916 A, 363, 4 N. C. C. A. 502.

43. *Cheever's Case*, 219 Mass. 244, 106 N. E. 861, L. R. A. 1916 A. note 248; *Blood v. Ind. Acc. Comm.*, 30 Cal. App. 274, 157 Pac. 1140; *Caca v. Woodruff*, 123 N. E. 120, 4 W. C. L. J. 51.

44. *London, etc. Acc. Co. v. Ind. Acc. Com.*, 173 Cal. 642, 161 Pac. 2. But see *Massini v. Pacific Coast Ry.*, 2 Cal. Ind. Acc. Com. 758.

45. *Hill v. Begg* (1908), 2 K. B. (Eng.) 802, 1 B. W. C. C. 320; *Rennie v. Reid* (1908), 45 Scotch L. R. 814, 1 B. W. C. C. 324; *Ritchings v. Bryant* (1913), 6 B. W. C. C. 183; *Knight v. Bucknill* (1913), 6 B. W. C. C. 160; *Aurora Brewing Co. v. Ind. Bd. of Ill.*, 277 Ill. 142, 115 N. E. 207, 15 N. C.

employed to do repairs in a private house, and after these repairs were finished was engaged to cut down some trees on the grounds near the house, in which work he was killed.⁴⁶

One employed to repair a tractor and to do other work about a ranch for a limited time was a casual employee, and the employment was not in the regular course of the employer's business.⁴⁷

One engaged in carpenter work upon a farm for about two days was a casual employee, and not engaged in the usual occupation of the employer.⁴⁸

One hired for a temporary and limited purpose is a casual employee within the West Virginia Act.⁴⁹

One employed to help move and erect a monument, requiring less than two days, was a casual employee.⁵⁰

A casual employee working for an employer whose principal business is hazardous, is within the New York Act.⁵¹

But where the company's business is non hazardous, a casual employee is not within the act.⁵²

C. A. 802; *Baer's Exp. & Storage Co. v. Ind. Bd.*, 282 Ill. 44, 118 N. E. 412, 1 W. C. L. J. 512.

46. *McCarthy v. Norcott*, 43 Irish L. T. 17; 2 B. W. C. C. 279; *Bedard v. Sweinhart*, (Ia.), 172 N. W. 937, 4 W. C. L. J. 377; *Black v. Wilson*, — Pa. —, (1920), 112 Atl. 126.

47. *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 158 Pac. 1031, 15 N. C. C. A. 810.

48. *State ex rel. Lennon v. Dist. Ct. Douglas Co.*, 138 Minn. 103, 164, N. W. 366, 15 N. C. C. A. 811; *State ex rel. Foss et al. v. Nelson*, — Minn. —, 176 N. W. 164, 5 W. C. L. J. 547.

49. *Western Union Telegraph Co. v. Hickman*, 248 Fed. 899, 2 W. C. L. J. 8.

50. *Cousineau v. Black*, 206 Mich. 479, 173, N. W. 203, 4 W. C. L. J. 409, *Ray v. Commercial Acid Co.*, — Mo. App. —, (1921), 227 S. W. 851.

51. *Cummings v. Fabric Co.*, 184 N. Y. App. 456, 171 N. Y. S. 1046, 18 N. C. C. A. 137, 2 W. C. L. J. 923.

52. *Galler v. Republic Novelty Works*, 180 N. Y. App. Div. 762, 168 N. Y. S. 263, 1 W. C. L. J. 691.

A finding that employment was casual within the meaning of the Texas Act remits both employer and employee to their common-law rights.⁵³

A man aiding movers on a pick up job, knowing the employment to be only for one particular moving job, is a casual employee.⁵⁴

A structural iron worker employed for a particular job only, requiring three or four days was engaged in casual employment.⁵⁵

In a recent Illinois case the court said, "We believe the Legislature intended that, where one is employed to do a particular kind of work, which employment recurs with regularity, and where there is a reasonable ground that such recurrence will continue for a reasonable time, such employment is not casual. On the other hand, where the employment for one job cannot be characterized as permanent or periodically regular, but occurs by chance, or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is casual," and held that where it was understood the employment was only for three or four weeks, the servant, while injured during the course of such work was a casual employee!⁵⁶

It was held that one not on the payroll, but permitted to sleep and remain about a livery barn and occasionally do small jobs for which he was immediately paid was a casual employee.⁵⁷

Where a man was hired to repair a well at \$1 an hour and the work consumed only two hours, he was held to be a casual employee.⁵⁸

53. *Texas Refining Co. v. Alexander*,—Texas Civ. App, 202 S. W. 131, 17 N. C. C. A. 535; *Bridger v. Lincoln Feed & Fuel Co.*, — Neb. —, (1920), 179 N. W. 1020, 7 W. C. L. J. 211.

54. *Thede Bros. v. Ind. Comm.*, 258 Ill., 483, 121 N. E. 172, 3 W. C. L. J. 242, 18 N. C. C. A. 133.

55. *Chicago Great Western R. Co. v. Ind. Comm. of Ill.*, 284 Ill. 573, 120 N. E. 508, 3 W. C. L. J. 14, 18 N. C. C. A. 132.

56. *Consumer's Mut. Oil, Producing Co. v. Ind. Com'n. et al.*, 289 Ill. 423, 124 N. E. 608, 5 W. C. L. J. 31; *Utah Copper Co. v. Indus. Comm. of Utah*, — Utah —, (1920), 193 Pac. 24, 7 W. C. L. J. 147; *Herberg v. Walton Auto Co.*, — Ia. —, (1920), 182 N. E. 204.

57. *Diamond Livery v. Indus. Com.*, 289 Ill. 591, 124 N. E. 609, 5 W. C. L. J. 33.

58. *Otmer v. Perry*, 94 N. J. 4, 108 Atl. 369, 5 W. C. L. J. 423.

Where blasting was required for only a few hours in the construction of a new road, such employment was held to be casual.⁵⁹

A carpenter, engaged in the construction of a house, for a corporation owning a ranch, is engaged in the usual course of the business of the employer as the business includes the construction and repair of its buildings.⁶⁰

The employment of an eleven-year-old boy to work in a store during the summer and to run errands for his employer, is not casual employment within the meaning of the statute, which does not include within this term employments for a definite time, as for a week, a month or longer.⁶¹

The claimant need not prove that the employment was not casual, as casual employment is an affirmative defense, to be proved by the employer.⁶²

After completing a job of roofing and having started on another job for a different employer, an employee told the first employer that the chimney needed a little work done on it, and that if the employer would furnish the cement he would do the work free of charge. It was held that the work of repairing the chimney was casual.⁶³

One who was employed by a New York Boiler Company for 15 years in setting up boilers in various states, was not engaged in casual employment while working within the state of Maine so as to preclude the application of the Maine Act.⁶⁴

A miner loaned to another employer according to a custom, for the purpose of fighting fire in a mine, was under the latter's control, and entitled to compensation. The court said: "The facts found by the referee justify the award. A master may loan his

59. *McLaughlin v. Ind. Board*, 281 Ill. 100, 117 N. E. 819, 15 N. C. C. A. 803.

60. *Miller v. Comm.*, 32 Cal. App. 250, 162 Pac. 651.

61. *McDonald v. Great Atlantic & Pacific Tea Co.*, — Conn. —, (1920), 111, Atl. 65, 6 W. C. L. J. 525.

62. *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173.

63. *Bedard v. Sweinhart*, — Ia. —, (1919), 172 N. W. 937, 4 W. C. L. J. 377.

64. *Smith v. Heine Safety Boiler Co.*, — Me. —, 112 Atl. 516.

servant, with the latter's consent, to another under such circumstances as to create for the time a new relation of master and servant; the regular servant of one may thus for the time being become the special servant of another, and that was done here.

"Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent although he remains the general servant of the person who lent him. The test is whether, in the particular service which he is engaged to perform, he continues subject to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired.' *Puhlman v. Excelsior E. & S. C. Co.*, 259 Pa. 393, 103 Atl. 218, L. R. A. 1918E, 118; 26 Cyc. 1285; *Bailey on Personal Injuries* (2d Ed.), c. 3, Par. 25. And see *Crouse et al. v. Lubin*, 260 Pa. 329, 103 Atl. 725.

"The deceased when injured was working in the interest of the defendant on its premises and under its control, and clearly, for the time being, its servant. That his wages had not been fixed is unimportant: the law will imply a reasonable compensation. The finding of a temporary employment by defendant is not inconsistent with the finding of a general employment by the Fick Coke Company, and being one of fact we are concluded thereby. *Gallagher v. Walton Mfg. Co.*, 264 Pa. 29, 107 Atl. 327; *Belmonte v. Connor*, 263 Pa. 470, 106 Atl. 787; *Messer v. Manufacturers' L. & H. Co.*, 263 Pa. 5, 106 Atl. 85.

"Persons whose employment is casual in character and not in the regular course of the business of the employer are excluded from the Workmen's Compensation Act (article 1, Par. 104, P. L. 1915, p. 736); but we cannot adopt the suggestion that this case comes within the exception. Putting out mine fires is as much in the regular course of the business as clearing passage ways or pumping water. There are two necessary elements to constitute the exception: (1) The employment must be casual in character, and (2) it must be outside of the regular course of the business of the employer. As we find this within such course, it is not necessary to determine whether the employment was casual in character or otherwise. This statute must be liberally construed (*Pater v. Superior Steel Co.*, 263 Pa. 244, 106 Atl. 202), which

it would not be by holding that the extinguishment of fire in a coal mine was a work outside of the regular course of the mining business. Being overcome by noxious gases while working in a mine is an 'accident' within the Workmen's Compensation Law. *Gurski v. Susquehanna Coal Co.*, 262 Pa. 1, 104 Atl. 801."⁶⁵

Where there was a contract for a fixed rate and to continue so long and for all the work that the employer had to do, the employment was not casual.⁶⁶

An employee, unloading cars of coal at 25 cents a ton at irregular intervals under a separate employment for the unloading of each particular car, is a casual employee and not entitled to compensation under the Nebraska Act.⁶⁷

§ 30. **Employments not Casual.**—A woodman who had been trimming trees for two months and had done this for the same employer for a number of seasons was not engaged in casual employment.⁶⁸

Where one is employed to do a particular service occurring somewhat regularly and with a fair expectation of its continuance for a reasonable period, his employment is not casual.⁶⁹

A farmer and teamster engaged by a canning factory to do hauling at such times as he might be needed during the season at a certain rate of pay, the hauling being a necessary part of the employer's business, was not a casual employee, since the question of who is a casual employee must be determined with principal reference to the scope and purpose of the hiring, rather than

65. *Tarr v. Hecla Coal & Coke Co.* — Pa. —, 109 Atl. 224, (1920), 5 W. C. L. J. 904.

66. *Johnson v. Choate* — Ill. —, 119 N. E. 972, 2 W. C. L. J. 458.

67. *Bridger v. Lincoln Feed & Fuel Co.* — Neb. —, (1920), 179 N. W. 1020, 7 W. C. L. J. 211.

68. *Smith v. Buxton*, (1915), 8 B. W. C. C. 196; 11 N. C. C. A. 383; *Tombs v. Bomford*, W. C. Rep. 229, 106 L. T. N. S. 823, 5 B. W. C. C. 338.

69. *Dyer v. James Black Masonry etc., Co.*, 192 Mich. 400, 158 N. W. 959; *Sabella v. Brazillierio*, 88 N. J. L. 505, 91 A. 1032; *Jordan v. Weinman*, 167 Wis. 474, 167 N. W. 810, 2 W. C. L. J. 417; *Boyle v. Mahoney & Tierney*, 92 Conn. 404, 103 Atl. 127, 1 W. C. L. J. 937, 18 N. C. C. A. 134.

with sole regard to the duration and regularity of the service.⁷⁰

A longshoreman, called frequently to serve a firm of ship owners in unloading their ship, was not in casual employment. The court said: "While this class of work was not constant, depending on there being a ship of the prosecutor in port, it appears that the deceased was frequently called upon by the prosecutors to serve them in this particular character of work, being one of a class of stevedores, ready to respond when called. We think this supports the finding that the employment was not 'casual' within the meaning of the word as expressed in the statute."⁷¹

One employed on a sawmill, on such a day as it operated during a period of four months was not a casual employee.⁷²

One employed for an indefinite period at a stipulated sum per day to work on a contract, for the erection of a structural steel building, could not be considered in casual employment.⁷³

Piece work in the employer's regular business is not ordinarily considered casual;⁷⁴ nor is employment casual because it is not for any specified length of time,⁷⁵ or for one job, or or that the deceased was injured the first day.⁷⁶

In California and Connecticut an arbitrary rule has been established to the effect that employment of less than ten days is casual

70. *State Accident Fund v. Jacobs*, 134 Md. 133, 106 Atl. 255, 4 W. C. L. J. 91; *Uphoff v. Ind. Bd. of Ill.*, 271 Ill. 312, 111 N. E. 128.

71. *Sabella v. Brazilierio*, 86 N. J. L. 505, 91 Atl. 1032, 6 N. C. C. A. 958.

72. *Clements v. Columbus Saw Mill Co.*, Ohio Ind. Comm. Co., No. 101, Oct. 21, 1914, 6 N. C. C. A. (note) 959; *Dyer v. James Black Masonry & Contracting Co.*, 192 Mich. 400, 158 N. W. 959; *Boyle v. Mahoney*, 92 Conn. 404, 103 Atl., 127, 1 W. C. L. J. 938.

73. *Clements v. Columbus Sawmill Co.*, Vol. 1, No. 7, Bul. Ohio. Indus. Com. p. 161, 6 N. C. C. A. (note) 959.

74. *Scott v. Payne Bros. Inc.*, 85 N. J. L. Law, 446, 89 Atl. 927, 4 N. C. C. A. 682.

75. *Schaeffer v. De Grottola*, 85 N. J. Law, 444, 89 Atl. 921, 4 N. C. C. A. 582; *Indus. Comm. v. Funk*, — Colo. —, 191 Pac. 125, 6 W. C. L. J. 436; *Mueller v. Oelkers Mfg. Co.*, 36 N. J. L. J. 117.

76. *Coyle v. Mass. Employers Ind. Assn.*, 2 Mass. Wk. Comp. Cases 704; *Johnson v. Choate*, 284 Ill. 214, 119 N. E. 972, 18 N. C. C. A. 138, 2

and more than ten days is not casual,⁷⁷ even though it may not be in the usual course of the employer's business.⁷⁸

In Wisconsin repairs about an industrial plant are neither casual nor without the usual course of business.⁷⁹

A laborer employed by a sewer builder over a period of five months, and who was injured while going from one job to another was not a casual employee. The contract of employment governing, and not the particular work being done.⁸⁰

Where the contract was for a fixed rate of wages and was to continue as long as the employer had any work to be done, the employment was held not to be casual.⁸¹

A carpenter foreman engaged in the construction of a 14 room house, involving several months of continuous work, was not casually employed.⁸²

The fact that the employee is merely "on trial", does not make his employment casual.⁸³

§ 31. **Farm Labor.**—Since all the American Compensation Acts, except New Jersey and Hawaii, expressly or impliedly ex-

W. C. L. J. 458, 119 N. E. 972; *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328; *American Steel & Foundries Co. v. Ind. Bd.*, 119 N. E. 902, 284 Ill. 99, 2 W. C. L. J. 462; *Doherty v. Grosse Isle*, 205, Mich. 592, 172 N. W. 596, 4 W. C. L. J. 222; *Marshall Field & Co. v. Ind. Comm. of Ill.*, 285 Ill. 333, 120 N. E. 773, 3 W. C. L. J. 105, 18 N. C. C. A. 134; *Cinofsky et. al. v. Ind. Comm. et al.*, 290 Ill. 521, 125 N. E. 286, 5 W. C. L. J. 185; *Indus. Comm. v. Funk*, — Colo. —, 191 Pac. 125, 6 W. C. L. J. 436.

77. *Jones v. Indus. Comm.* — Cal. App. —, 200 Pac. 111, Conn. Act § 7½(b); *Augustine v. Cotter*, 2 Cal. I. A. C. Dec. 59; *Brain v. Eisfelder*, 2 Cal. I. A. C. Dec. 30; *Trenholm v. Hough*, 1 Cal. I. A. C. Dec. 260.

78. *Armstrong v. Ind. Acc. Comm.*, 36 Cal. App. 1, 171 Pac. 321, 1 W. C. L. J. 922.

79. *F. C. Cross & Bros. Co. v. Ind. Comm.*, 167 Wis. 612, 167 N. W. 809, 2 W. C. L. J. 415; *Holman Creamery Ass'n. v. Ind. Comm.*, 167 Wis. 470, 167 N. W. 808, 2 W. C. L. J. 412.

80. *Scully v. Ind. Comm. of Ill.*, 284 Ill. 567, 120 N. E. 492, 18 N. C. C. A. 136, 3 W. C. L. J. 30.

81. *Johnson v. Choate*, 284 Ill. 14, 119 N. E. 972, 2 W. C. L. J. 458.

82. *Miller & Lux v. Industrial Acc. Comm.*, — Cal. App. —, 162 Pac. 651, 14 N. C. C. A. 1087.

83. *Mueller v. Oelkers Mfg. Co.*, 36 N. J. L. J. 117.

clude farm labor from their operation, the question of what may or may not properly be considered such labor within the intent of the various acts is naturally of importance. The exclusion of farm labor was perhaps based more on legislative expedience than upon sound reason, as the accidental injuries suffered in this class of employment ranks next to that of railroad employment, according to a report of the Wisconsin Labor Bureau, while other American and also European experience proves quite conclusively that agriculture is a highly hazardous employment. It is not excluded from the acts of the more important European countries.⁸⁴ It may be said, however, that the farm industry is perhaps less able than others to add the cost of compensation insurance to the market price of its product and pass it on to the consumer because that price is as a rule fixed by those in control of distant markets, and is perhaps also more quickly affected by the law of supply and demand than the products of most other industries.

"Employment of farm labor" and "agricultural employments" are used as more or less synonymous terms in the various compensation acts. Thus the court in an Alabama case quotes the following definition from Webster. "Agriculture is the art or science of cultivating the ground, especially in fields or in large quantities, including the preservation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding and management of live stock; tillage; husbandry; farming."⁸⁵ "The common hired man on a farm is required to perform a great variety of work. His duties are not confined to plowing, planting and harvesting. Tilling the soil and gathering in the crops may be the principal work of the farm laborer, but they are by no means his exclusive work. All the multifarious work of operating a farm must be done by somebody; and who is to do it except the farm laborer? It is, of course, necessary to keep the farm machinery in repair—the reapers, mowers, corn harvesters, sulky plows, wagons, harness,

84. Great Britain, Germany, Austria Hungary, Italy.

85. *Dillars v. Webb*, 55 Ala. 474; *Springer v. Lewis*, 22 Pa. 191; Farm defined *Winn v. Cabot*, 18 Pick. (Mass.) 553; *Wheeler v. Randall*, 6 Metc. (Mass.) 529; *Commonwealth v. Carmalt*, 2 Binn. (Penn.) 235 *Seggebruch v. Ind. Comm. of Ill.*, 123 N. E. 276, 4 W. C. L. J. 156.

etc. It is just as necessary to keep the farm buildings in repair, and occasionally to make small additions to them. This is part of the routine work of the farm laborer; just as much so as milking the cows, cleaning off the horses, building fences, putting a new point on the plow, doctoring a sick horse, butchering the hogs, greasing the wagons, assisting the threshers, driving the team to market and innumerable other familiar duties.

"Is the hired man, who pounds his finger while shingling the pig pen, any the less a 'farm laborer' than when he pounds his finger while building a fence? It is the duty of a farm laborer to build a load of hay; it is likewise his duty to help shingle the barn to protect the hay from the elements. Both processes are necessary in order to preserve the hay. Both are essentially within the scope of the duties of the farm laborer, and it makes no difference in principle whether he breaks his leg falling from the roof of the barn or the load of hay." ⁸⁶

It has been held that the fact that a farm hand was engaged in logging in the winter did not take his work out of the class of "farm labor" as used in the compensation act;⁸⁷ that an employee injured while operating a corn shredder for his employer, who was operating under a contract with a farmer to do such work, was engaged in farm labor even though the employer was operating the corn shredder as an independent contractor for profit,⁸⁸ that an employee of a drug manufacturer which operated a farm in furtherance of its business on which the employee worked was a farm laborer;⁸⁹ that one temporarily engaged in making repairs on a dairy barn, though his regular occupation

86. *Coleman v. Bartholomew*, 175 App. Div. 122, 161 N. Y. Supp. 560; *Smith v. Coles*, 93 L. T. 754, 8 W. C. C. 116; *In re Kasney*, 104 N. E. 438, 217 Mass. 5; *Kauri v. Messner*, 198 Mich. 126, 164 N. W. 537, 17 N. C. C. A. 467. Contra, *State v. Nelson*, — Minn. —, 176 N. W. 164, 5 W. C. L. J. 547; *Uphoff v. Indus. Bd.*, 271 Ill. 312, 111 N. E. 128.

87. *Brockett v. Mietz*, 184 App. Div. 342, 171 N. Y. S. 412, 2 W. C. L. J. 688.

88. *Slycord v. Horn*, 179 Iowa 936, 162 N. W. 249, A 1 W. C. L. J. 589, 16 N. C. C. A. 592.

89. *Shafer v. Parke, etc. Co.*, 192 Mich. 577, 159 N. W. 304; *Saggebruch v. Ind. Comm. of Ill.*, 123 N. E. 276, 4 W. C. L. J. 156.

was that of farm laborer, was excluded from the act;⁹⁰ that a person engaged to milk cows and take care of poultry is a farm laborer;⁹¹ that a teamster engaged to haul to town the wood and brush, which a farmer was cutting down to clear his land, was a farm laborer;⁹² that blasting out stumps may be agriculture work;⁹³ that one hired to clear land to be set out with fruit trees is a farm laborer;⁹⁴ that a farm hand ordered to haul a load of lumber from a point in a city to a railroad station for shipment to another farm of his employer is still a farm laborer;⁹⁵ that the employees of the owner of a hay press who go from farm to farm to bale hay at a stipulated price are farm laborers.⁹⁶

The owner of a farm is not within the act when building a barn upon the farm. As stated by the court, "If this was a work within the usual course of their business or occupation, then it was farm labor, and if it was farm work, there is no escape from the conclusion that one performing it was a 'farm laborer' and 'farm laborers' have been denied the benefit of of the Compensation Act."⁹⁷

One engaged as a janitor, and whose duties included the care of the trees and grounds, and who was injured while trimming a tree, was engaged in horticulture within the meaning of the California Act and hence not within the Act.⁹⁸

Where a group of farmers purchased a threshing machine primarily for their own use, "such primary purpose becomes

90. *Coleman v. Bartholomew*, 175 App. Div. 122, 161 N. Y. S. 560.

91. *Wolfe v. E. W. Scripps*, 1 Cal. Ind. Acc. Com. (Part II) 509.

92. *Hanson v. Scott*, 2 Cal. Ind. Acc. Com. 721.

93. *Martin v. Russian River Fruit and Land Co.*, 1 Cal. Ind. Acc. Com. (Part II) 18.

94. *Whitney v. Charles Peterson*, 1 Cal. Ind. Acc. Com. (Part II) 306.

95. *Ratcliff v. C. F. De Witt Co.*, 1 Cal. Ind. Acc. Com. (Part II) 639.

96. *Andrus v. Atkinson* (1916), 3 Cal. Ind. Acc. Com. 224; *Morris v. Spears*, 1 Cal. Ind. Acc. Com. 224; *Vincent v. Louis*, 2 Cal. Ind. Acc. Com. 168; *Neimeyer v. Volger*, 2 Cal. Ind. Acc. Com. 335; *Threshing machine case, State v. Watonwan* (Minn.) 168 N. W. 130, 2 W. C. L. J. 522.

97. *State ex rel. Foss et ux. Nelson* Dist. Judge, 145 Minn. —, 176, N. W. 164, 5 W. C. L. J. 547.

98. *George v. Ind. Acc. Comm.* 178 Cal. 733, 174 Pac. 653, 2 W. C. L. J. 748.

controlling in determining the nature and character of their business within the meaning of the Industrial Act," and the court held that one employed upon the machine was engaged in farm labor.⁹⁹

But a servant employed to poison prairie dogs for an employer engaged in cattle raising is not a farm laborer.¹

A farm laborer who incidentally helps harvest ice to be stored for use on the farm is engaged in farm labor.²

One assisting another who is driving a caterpillar engine attached to a harrow is engaged in farm work and not in the operation of farm machinery within the exception of an insurance policy excluding such operation.³

A farmer does not become a bridge builder by building a bridge on his farm.⁴

It has been held that the exemption of farm laborers does not violate the clause of the constitution, requiring equal protection of the laws.⁵

One hauling garbage in his own truck, to his employer's farm, where it was fed to pigs, was held to be a "farm laborer."⁶

§ 32. Employments Held not to be Farm Labor.—It has been held that one employed by the owner of a threshing outfit to go from farm to farm and thresh as a business is not a farm laborer;⁷ that a carpenter who sometimes did farm labor when there

99. *Jones v. Ind. Comm.*, — Utah —, 187 Pac. 833, 5 W. C. L. J. 747; *State ex rel. John Bykle v. Dist. Court*, 140 Minn. 398, 168 N. W. 130, 16 N. C. C. A. 596. But see note 7, sec. 32.

1. *C. C. Slaughter Cattle Co. v. Pastrana*, — Tex. Civ. App. —, (1919) 217 S. W. 749, 5 W. C. L. J. 599.

2. *Muller v. Little*, 173 N. Y. S. 578, 3 W. C. L. J. 500.

3. *Maryland Casualty Co. v. Indus. Acc. Comm.* — Cal. —, 173 Pac. 993

4. *National Acc. Society v. Taylor*, 42 Ill. App. 97.

5. *N. Y. C. R. R. Co. v. White*, 243 U. S. 247.

6. *State Indus. Comm. v. Wiseman*, 183 N. Y. S. 112 (1920), 6 W. C. L. J. 481.

7. *In re Boyer*, 64 Ind. App. —, 117 N. E. 507, 1 W. C. L. J. 45, 16 N. C. C. A. 592; *White v. Loades*, 178 App. Div. 236, 164 N. Y. S. 1023; *Vincent v. Taylor Bros.*, 180 App. Div. 563, 168 N. Y. S. 287, 1 W. C. L. J. 692; *Connolly v. Peoples, G. L. & C. Co.*, 260 Ill. 162; *Reed v. Smith Wilkinson Co.*, (1910), 3 B. W. C. C. 223.

was no carpenter work to be done, was not a farm laborer when injured while doing carpenter work;⁸ that a carpenter engaged by a farmer to build a cornerib was not a farm laborer;⁹ that a painter engaged to paint the roof of a farm building was not a farm laborer;¹⁰ that a machinist repairing a traction engine on a farm is not engaged in farm labor;¹¹ that one engaged in building a reservoir for irrigation purposes is not a farm laborer;¹² that inspection of farms with a view of exchanging a garage for them is not farm labor.¹³

The California Workmen's Compensation Act excludes farm laborers, but under the Roseberry Act of 1911 the farm employee may recover where the injury is due to the negligence of a fellow servant, the Compensation Act not having repealed the application of the Roseberry Act to farm employees.¹⁴

One engaged as game keeper to protect game from poachers is not engaged in farm labor.¹⁵

Nor is a carpenter engaged as foreman for construction of ranch buildings engaged in farm labor.¹⁶

One engaged in labor upon a trout farm, in the propagation of trout for domestic purposes, was not a farm laborer. The fact that the business was one prohibited by statute did not preclude the employee from recovering compensation.¹⁷

8. *Feehan v. Tevis*, 2 Cal. Ind. Acc. Com. 452; 11 N. C. C. A. 377; *Matis v. Schaeffer*, — Pa. —, 1921, 113 Atl. 64, 8 W. C. L. J. 140.

9. *Uphoff v. Ind Bd. of Ill.*, 111 N. E. 128, 271 Ill. 312, 13 N. C. C. A. 80; *Griswold v. City of Wichita*, 99 Kan. 502, 162 Pac. 276; *Reilly v. Newhall Lumber & Farming Co.*, (1916), 3 Cal. Ind. Acc. Com. 208; *Blaine v. McKinsey*, 1 Cal. Ind. Acc. Com. 641, 11 N. C. C. A. 368.

10. *McComsey v. Simmons*, (1916), 7 N. Y. St. Dep. Rep. 433.

11. *Snow v. Harris*, 2 Cal. Ind. Acc. Comm. 348; 11 N. C. C. A. 368.

12. *Howell v. Lanfair*, 5 Cal. Ind. Acc. Com. 176.

13. *Evans v. Bay Cities Garage Corp.*, 5 Cal. Ind. Acc. Com. 122.

14. *Burns v. Southern Pac. Co.*, — Cal. App. —, 185 Pac. 875, 5 W. C. L. J. 358.

15. *Shafter Estate Co. v. Ind. Acc. Com'n.*, 175 Cal. 522, 166 Pac. 24.

16. *Miller Lux Inc. v. Ind. Acc. Com'n*, 32 Cal. App. 250, 162 Pac. 651, 16 N. C. C. A. 600.

17. *Krobitzsch v. Ind. Acc. Com'n. (Cal.)*, 185 Pac. 396, 5 W. C. L. J. 136.

A man engaged in labor upon a farm bought and improved for speculative purposes and upon which no farming was being done, was not engaged in farm labor.¹⁸

A cattle ranch laborer is not a farm laborer, within the meaning of the Texas act.¹⁹

§ 33. **Domestic Servants.**—The law relating to this question has not kept pace with changed conditions wrought by time, and comes to us today tainted too much by the conditions existing many generations ago, when the lord or baron maintained intra moenia, a class of servants taking their name from the fact that they lived “within the walls.” Today this class of servants is usually denominated “domestic servants.” They take their name from the character of work performed, and not from the place where they eat or sleep or customarily reside when not actually performing services. The test, therefore, of whether or not a servant is a “domestic” is the character of work performed by him in or about the home of the employer.

Domestic means attached to the occupations of the home or the family, pertaining to home life, or to household affairs or interests.²⁰ Domestics, “those who reside in the same house with those they serve.”²¹ Servants and domestics are “those who receive wages and stay in the house of the person paying and employing them, for his service or that of his family; such are valets, footmen, cooks, butlers and others who reside in the house.”²²

Domestic servants are expressly or impliedly excluded from the acts of all the American States, except New Jersey.²³ They are included in the British Compensation Act. The decisions on the

18. *O'Dell v. Bowman et al.*, 189 App. Div. 386, 179 N. Y. S. 592, 5 W. C. L. J. 439.

19. *C. C. Slaughter Cattle Co., v. Pastrana*, — Tex. Civ. App. —, 217 S. W. 749 5 W. C. L. J. 599.

20. *Century Dictionary*, 14 Cyc. 828.

21. *Bouvier*.

22. *Cook v. Dodge*, 6 La. Ann. 276.

23. *Rucker v. Reed*, 39 N. J. L. J. 48, 12 N. C. C. A. 252.

subject of domestic servants in relation to compensation acts are few and unsatisfactory.

It has been held that one engaged to do work about the house and grounds of his employer, who did not live on the premises and did no work in the house is not a domestic servant;²⁴ that a cook employed in a boarding house, is not a domestic servant;²⁵ that an undercoachmen, who boards with his employer's coachman and sleeps in a room over the coachhouse is not a domestic;²⁶ that one engaged to perform various services about the house and premises including attending to the furnace and mowing the lawn, who sleeps in the house and eats at the family table is a domestic servant;²⁷ that a porter in a saloon, who was sent to wash the windows of an apartment above the saloon, where the proprietor resided was in domestic service, and not entitled to compensation;²⁸ that a man who made his living by attending furnaces of several homes was a domestic servant.²⁹ Under the common law a domestic is a servant or hired laborer living with the family of his employer;³⁰ but the term does not extend to workmen and laborers, exclusively employed outside of the house.³¹ Nor is a maid who does general house work and in addition waits upon patients in a sanitarium engaged in domestic service.³²

§ 34. **Persons Whose Average Annual Earnings Exceed a Stated Amount, Excluded.**—There are only a few of the American Compensation Acts, whose application is limited to employees or workmen and officials who earn less than a specified amount.³³

24. *Cleveand v. Hastings*, 2 Cal. Ind. Acc. Com. 18.

25. *Comaskey v. Coleman*, 3 Cal. Ind. Acc. Com. 95.

26. *In re Howard*, 63 Fed. 263.

27. *Legal Op. Ia. Ind. Com.* (1915), 16.

28. *Castallotti v. McDonnell*, 1 Cal. Ind. Acc. Com. (Part II) 351, 11 N. C. C. A. 375.

29. *Bul. No. 9. Minn. Dep. Labor & Ind.* 21.

30. *10 Am. & Eng. Ency.* 4.

31. *Wakefield v. State*, 41 Tex. 556.

32. *Gerhardt et. al. v. Ind. Acc. Comm. of Cal.* 185 Pac. 307, 5 W. C. L. J. 151.

33. Missouri \$3600; New Jersey Chapt. 145 Laws of 1913, \$1200; Maryland \$2000.00; Idaho & Utah not applicable to public officials who receive

The reason underlying such provisions is economically sound, as it is considered that when an industry pays its workmen wages beyond a specified amount, the cost of industrial accidents is thereby paid in advance, by the consumer to the worker and like the employer such employees may properly be expected to save part of their earnings for old age and periods of possible disability.

It would appear that, if an employee engaged in two classes of employment or was employed by several employers, and the sum and total of all his earnings, exclusive of income independent of earnings, exceeded the stated sum per annum, for the year preceeding his injury, he would not be entitled to the benefits of the act.

Under the British Act only employees earning less than £250 a year are covered unless they are engaged in a manual labor, in which event the amount of their earnings is immaterial. It has been held that the manager of a colliery, who received £400 a year, but did no manual labor, was not a "workman" within the meaning of the British Act.³⁴ The same decision was rendered in the case of a chemist, a considerable part of whose work was manual labor.³⁵ In the case of a ship captain, whose salary exceeded £250 a year, but whose contract provided for a reduction below that amount in case of damage to the ship, it was held that upon the loss of the ship the wages of the captain must be considered at the reduced amount, which therefore entitled his dependents to compensation.³⁶

§ 35. **Officials of Political Subdivisions.**—The acts of a number of states exclude officials of political subdivisions. The decisions are somewhat in conflict on the question of who may properly be classed as such officials.

in excess of \$2400.00 a year; Porto Rico \$1500.00; Hawaii not applicable to public officials who receive in excess of \$1800.00 a year and private employees whose weekly remuneration exceeds \$36.00, N. Dak. § 2.

34. *Simpson v. Ebbw-Vale Steel, Iron & Coal Co.*, 92 L. T. 282, 7 W. C. C. 101.

35. *Bagnall v. Levinstein* (1906), 96 L. T. 184; 9 W. C. C. 100.

36. *Williams v. S. S. Martime* (1915), 8 B. W. C. C. 269.

The able jurist, Judge Cooley, states that: "The officer is distinguished from the employee in the greater importance, dignity and independence of his position, in being required to take an official oath; and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office; and usually, though not necessarily, in the tenure of his position."³⁷

The question has arisen in several states whether policemen were public officers or employees of a city. In a Michigan case the court said: "The decision of the Industrial Board can be affirmed only if it is found that a policeman of the city of Pontiac, under the facts stipulated, is an employee and not a public officer. Policemen generally are charged with the special duty of protecting the lives of citizens within certain territorial limits, and of preserving peace. The preservation of the public peace being a matter of public concern, it has therefore been said that policemen may be considered as public officers. As a rule, they are appointed under authority given by the State, and therefore have generally not been regarded as servants or agents or as otherwise bearing a contractual relation to the municipality." The court held in this case that as public officers, policemen were not "employees" within the scope of the act. The court cited *Schmitt v. Dooling*, 145 Ky. 240, 140 S. W. 197. In that case the Kentucky Court of appeals in unmistakable terms held that both policemen and firemen were public officers.³⁸

But in a more recent Michigan case it was held that firemen and subofficers having minor authority over others are not offi-

37. *Throop v. Langdon*, 40 Mich. 673. See also *United States v. Maurice* Fed. Cas. No. 15747; *In re Robert H. Barclay* 2nd A. R. U. S. C. C. 67. *In re Edwin H. Jewel* 2nd A. R. U. S. C. C. 68.

38. *Blynn v. City of Pontiac*, 185 Mich. 35, 151 N. W. 681, 8 N. C. C. A. 793; State Board of Agriculture or regents of university are not under the act. *Agler v. Mich. Agriculture College*, 181 Mich. 559, 148 N. W. 341; *Albee v. Weinberger*, 69 Ore. 326, 138 Pac. 859; *Shelmadine v. City of Elhardt*, — Ind. App. —, 1921, 129 N. E. 878; *Reising v. City of Portland*, 57 Ore. 295, 111 Pac. 377. But see *Labelle v. Grosse Point Shores* 167 N. W. 923, 206 Mich. 371; *McNally v. City of Saginaw Mich.*, 163 N. W. 1015; *McCarl v. Borough of Houston (Pa.)* 106 Atl. 104, 3 W. C. L. J. 789. Mich. Act. Am. 1921, Part I, § 7.

cials of a city organized under home rule law, within the meaning of the workmen's compensation act.³⁹

In an Indiana case the court approached this subject from a different angle in substance holding that the intention of the parties governed. The court disregarded the principle that an insurance contract cannot enlarge the coverage of the act. The court said: "It is appellant's contention that George A. Conduitt was an officer and not an employee of the city of New Castle, and therefore that the appellant was not liable under the policy issued to the city.

"We do not deem it necessary to enter into a general discussion of this subject. It appears that, at the time the insurance policy was issued, it was the intention of the appellant that the policy should cover city firemen. The appellant and the city contracted with that idea in mind. The salaries of the fireman were taken into consideration in fixing the amount of the premium to be paid appellant for such policy. The appellant accepted and retained such premium, treating the said firemen as employees. It prepared or caused to be prepared the report of George A. Conduitt's death to be filed with the Industrial Board. It prepared and caused the compensation agreement between the city and the dependents of George A. Conduitt to be entered into and approved by the Industrial Board. After approval of said agreement for compensation, the appellant made 104 weekly payments in accordance with the award made by the board. Under the facts and circumstances as disclosed by the record, we are of the opinion that in so far as the appellant is concerned George A. Conduitt was an employee of the city of New Castle."⁴⁰

It has been held that a deputy surveyor whose duties, salary and fees are fixed by statute is an official and not an employee;⁴¹ that a policeman of a city is a public officer holding his office as a trust from the state, and not as a matter of contract between

39. *McNally v. City of Saginaw*, — Mich. —, 163 N. W. 1015, A 1 W. C. L. J. 971. See Am. 1921, Part I, § 7, Mich. Act.

40. *Frankfort Gen. Ins. Co. v. Conduitt*, — Ind. App. — (1920), 127 N. E. 212, 6 W. C. L. J. 25, Nev. Act. Am. 1921, § 7½.

41. *Emerson v. Mass. Employees Ins. Ass'n*, 2 Mass. Wk. Comp. Cases, 181. Firemen were regarded as public officers, 223 Mass. 270, 111 N. E. 788.

himself and the city;⁴² that an award of compensation could not be made by the Illinois Industrial Board, in the case of the death of a special policeman, due to the accidental discharge of a revolver, because he was not engaged in an extra-hazardous employment and while the court did not decide the question it did say that the deceased was an employee and not an officer.⁴³ The Illinois Act excludes officials of the state and its subdivisions, and in a late Illinois case it has been held that policemen are officials and therefore excluded.⁴⁴

Police Officers are not employees under the Montana Act,⁴⁵ nor under the Kansas Act, as amended.⁴⁶ Under the Virginia Act policemen are employees but are not entitled to compensation because they are public officers.⁴⁷ It has been held in California that a speed officer injured by a fall from a motor cycle while pursuing a speeding automobile was entitled to compensation from the county by which he was employed.⁴⁸ Originally

42. *Ex parte Preston*, 72 Tex. Cr. R. 77, 161 S. W. 115. See also *McQuillin on Municipal Corporations*, II, 940, and V. 5049; 28 Cyc. 497; *Woodhull v. Mayor of N. Y.*, 150 N. Y. 450, 44 N. E. 1038; *Kimball v. Boston*, 1 Allen 417; *Buttrick v. Lowell*, 1 Allen 172; 79 Am. Dec. 721; *Norristown v. Fitzpatrick*, 94 Pa. St. 121; *Everill v. Swan*, 17 Utah 514, 55 Pac. 68; *Brown v. Russel*, 166 Mass. 14, 32 L. R. A. 253, 55 Am. St. Rep. 357N; *Dempsey v. New York Central & H. River Co.*, 146 N. Y., 290; *McKain v. Baltimore & O. R. Co.*, 65 W. Va. 233, 23 L. R. A. (N. S.) 289; *Scherl v. Flam*, 136 App. Div. (N. Y.) 753, 121 N. Y. S. 522; *Lizano v. City of Pass Christian*, 96 Miss. 640, 50 So. 951; *Ryan v. City of New York*, 126 N. E. 350, 5 W. C. L. J. 718. But see *Mangam v. Brooklyn* 98 N. Y. 585, 50 Am. Rep. 705; *Devney v. Boston*, 223 Mass. 270, 111 N. E. 788; *Rooney v. City of Omaha*, — Neb. —, 181 N. W. 143. Modifying former opinion in 177 N. W. 166.

43. *Marshall v. City of Pekin*, 114 N. E. 497, 276 Ill., 187; *City of Jacksonville v. Allen*, 25 Ill. App. 54, 58.

44. *City of Chicago v. Ind. Com.*, 291 Ill. 23, 125 N. E. 705, 5 W. C. L. J. 501. *Contra Wyoming Act*, Am. 1921, § 4318.

45. Report (1915) Mont. Ind. Acc. Bd. 214.

46. *Griswold v. Wichita*, 99 Kan. 502, 162 Pac. 276, Ann. Cas. 1917D, 31. See *Udey v. Winifield*, 97 Kan. 279, 155, Pac. 43, 14 N. C. C. A. 943.

47. *Mann v. City of Lynchburg—Va.*—(1921), 106 S. E. 371.

48. *Donahue v. County of Marin*, 2 Cal. Ind. Acc., 137. A deputy Sheriff appointed for his own convenience in a special case is not an employee. *Yancey v. County of Los Angeles*, 2 Cal. I. A. C. Dec. 601.

the provision, of the California Act, defining employee was not clear as to whether officials were included. Since the Commission's aforementioned ruling as to the speed officer the Act has been amended to include "all elected and appointed paid public officers."

It has been held in California⁴⁹ and Connecticut⁵⁰ that a sheriff is not an employee of the county, also that the relationship of employer and employee does not exist between a city and an election officer, so as to entitle him to compensation when injured while carrying returns from his district to the proper officer.⁵¹ And a member of the national guard who was injured in a competitive shooting match was held to be in the service of the state, and his injury arose out of the employment.⁵²

The Minnesota Act excludes any official who shall have been elected or appointed for a regular term of office. Under this phraseology, it was held that since policeman were not appointed for a regular term, they were employees within the meaning of the act.⁵³ For the same reason firemen were also held to be within the Minnesota Act.⁵⁴ The Ohio,⁵⁵ Pennsylvania,⁵⁶ and Wisconsin Acts⁵⁷ include policemen and the British Act expressly excludes them.⁵⁸

Officials who have been "elected or appointed for a regular term of office," within the language of the Nebraska Act, means comformable law.⁵⁹

49. *Cordelia Hay Dolan v. Mono County*, 175 Cal. 752, 167 Pac. 377 A 1 W. C. L. J. 150; *City Marshal Renaldi v. The Town of Rocklin*, 1 Cal. Ind. Acc. Com. (Part II) 206.

50. *Sibley v. State*, 89 Conn. 682, 93 Atl. 161, Am. 1921, § 5388.

51. *Los Angeles v. State Ind. Acc. Com.*, 35 Cal. App. 31, 169 Pac. 260, 1 W. C. L. J. 298.

52. *Wallace v. National Guard of Cal.*, 3 Cal. I. A. C. 94.

53. *State ex rel. City of Duluth v. Dist. Court of St. Louis, Co., et al.*, 158 N. W. 791; *Segale v. St. Paul City Ry. Co.*, — Minn. —, (1921). 180 N. W. 777.

54. *Id.* 791.

55. *In re Frances E. Lyman*, Vol. 1, No. 7, Bul. Ohio, In. Com. p. 182.

56. *McCarl v. Borough of Houston*, 263 Pa. 1, 106 Atl. 104, 3 W. C. L. J. 788.

57. *Village of Kiel v. Ind. Com. of Wis.* 158 N. W. 68; Acts of 1913, §§ 2394, 2397.

58. Section 13, Acts of 1906.

59. *Rooney v. City of Omaha*,—Neb.—, 177 N. W. 166, 6 W. C. L. J. 69.

§ 36. **Employees of the State and its Political Subdivisions.**—A number of the acts make it compulsory for the State, its political subdivisions, commissions, boards, etc., to pay compensation as provided under the Act, unless the employee has rejected the Act, where that is permitted.⁶⁰

While the state is a sovereign and is not liable for torts of its officers and agents, it may consent to such and similar liability by legislative enactment.⁶¹ So too, such liability may be expressly or impliedly imposed by statutes upon a county,⁶² township or municipality.⁶³ The validity of such statutes in the form of compensation acts has been upheld or gone unquestioned in many cases in which the states and their various political subdivisions have been held liable to pay compensation. Though it has been held in some jurisdictions that the state is not covered by the act in carrying on work incidental to its governmental functions and not for pecuniary gain.⁶⁴ Where a state engages in business like an individual it throws off, for the purpose, its sovereignty and becomes subject to the rules governing private individuals.⁶⁵

It was held that a carpenter employed by the department of Public Works of the State of New York, who was using a sledge when a splinter from a hammer struck him in the eye, causing the loss of the eye, was entitled to compensation under the New York Act, as an employee of the State,⁶⁶ and that a teacher in a state imbecile school is an employee of the state of Connecticut and entitled to compensation when injured;⁶⁷ but Massachusetts holds

60. Calif., Conn., Ill., Ia., Mass., Mich., Minn., Neb., N. J., N. Y., Ohio, Wis., Ky., applies to municipal corporations, but not to the State, Oregon excludes municipal corporations. *Hornig v. Town of Canby*, — Ore. —, (1920), 188 Pac. 700, 5 W. C. L. J. 887.

61. 36 Cyc. 881 and 911 and cases cited.

62. 11 Cyc. 497 and cases cited.

63. 28 Cyc. 1257 and cases cited; *McLaughlin v. Industrial Board*, 281 Ill. 100, 117 N. E. 819, 1 W. C. L. J. 504.

64. *Allen v. State*, 160 N. Y. S. 85, 173 App. Div. 455; *Redfern v. Eby*, — Kan. —, 170 Pac. 800, 1 W. C. L. J. 768; *Miller v. Pillsbury* — Cal. —, 128 Pac. 327.

65. *State Bank v. Dibrell*, — Tenn. —, 3 Sneed 379.

66. *Jennings v. Department of Public Works*, 5 N. Y. St. Dep. 416.

67. *Skinner v. Connecticut School for Imbeciles*, 1 Conn. Comp. Dec. 106; *Spillane v. State of Conn.* 1 Conn. Comp. Dec. 505.

to the contrary;⁶⁸ that a county was liable for injury to an employee working in a gravel pit;⁶⁹ that a park caretaker was an employee of the city and entitled to compensation as such;⁷⁰ that a street sweeper who was run down and injured by a vehicle on the public streets was allowed to recover from the city;⁷¹ that the dependents of a citizen killed while complying with a request by a village marshal to assist in the arrest of an offender was entitled to compensation;⁷² that a high school boy working in a manual training department of a school for pay at the direction of the principal, with the acquiescence of the school board, was an employee of the city;⁷³ that the members of a crew, selected by an agent of a town to build a bridge, were employees of the town;⁷⁴ that a city, constructing a sewer, not being engaged in a gainful enterprise, is not within the Kansas Act.⁷⁵ The New York Act contained a similar provision, prior to the amendment of 1916.⁷⁶ Under the Illinois Act municipal corporations have the same right of election as other employers,⁷⁷ and it has been held in a recent Illinois case that a street sweeper was engaged in the business of maintaining a structure for the city and entitled

68. *Lesner v. City of Lowell*, — Mass. —, 116 N. E. 483, A 1 W. C. L. J. 863.

69. *Popke v. Waupaca County*, Wis. Ind. Com. Bul. (1912) 98, 8 N. C. C. A. (note) 960.

70. *City of Superior v. Industrial Commission et al.*, 160 Wis. 541, 8 N. C. C. A. 960, 152 N. W. 151.

71. *Purdy v. Sault Ste. Marie Mich.* Ind. Acc. Bd., 5 N. C. C. A. 905; *Lowney v. City of New Bedford*, 2 Mass. Ind. Acc. Bd. 724; *City of Rock Island v. Ind. Comm.*, 286 Ill. 76, 122 N. E. 82, 3 W. C. L. J. 592.

72. *Village of West Salem v. Ind. Com.*, 162 Wis. 57, 155 N. W. 929.

73. *Schmitz v. City of Appleton*, Wis. Ind. Com. Bul. (1913) 31, 8 N. C. C. A. 96; *White v. Boston*, 226 Mass. 517, 116 N. E. 481.

74. *Peabody v. Town of Superior*, Wis. Ind. Com. Bul., (1912) 99, 8 N. C. C. A. 961; *Lanagan v. Town of Saugerties*, 167 N. Y. S. 654, 1 W. C. L. J. 675.

75. *Roberts v. Ottawa*, 101 Kan. 228, 165 Pac. 869; *Redfern v. Eby* (Kan.), 170 Pac. 800, 1 W. C. L. J. 768; *Gray v. Board*, 101 Kan. 195, 165 Pac. 867; *Griswold v. City of Wichita*, — Kan. —, 162 Pac. 276, A. 1 W. C. L. J. 621.

76. Section 3 Subd. 3, *Allen v. State*, 173 App. Div. 455, 160 N. Y. S. 85.

77. *Marshal v. Pekin*, 276 Ill. 187, 114 N. E. 497; Ill. Act. § 3, Am. 1921.

to compensation;⁷⁸ while under the Montana Act, cities have no right of election.⁷⁹

It has been held that a county could not defeat the claim of an injured workman on the theory that there is no money in the county treasury available, especially when that fact was not pleaded;⁸⁰ that the Texas Act applying to all corporations having more than five employees applies to a City;⁸¹ that under the California Act, a municipal corporation is liable for compensation to the employees of a municipal contractor;⁸² that a street inspector, who inspects the work of a street paving contractor, is an employee of the municipality;⁸³ that employees of a city engaged in the maintenance of its water mains were under the Illinois Act;⁸⁴ that the Sanitary District of Chicago, which is a quasi-public municipality, comes within the act;⁸⁵ that municipalities and their employees come under the compensation acts of Maryland,⁸⁶ New Jersey,⁸⁷ Ohio⁸⁸ and Washington;⁸⁹ that a reclamation district, being a mere governmental agent with limited powers, is not an employer within the definition contained in the California Act.⁹⁰

A laborer appointed under Section 188 of the Military Law of

78. *City of Rock Island v. Indus. Comm.* 287 Ill. 76.

79. *Butte v. Ind. Acc. Bd.*, 52 Mont. 75, 156 Pac. 130.

80. *Nevada Ind. Com. v. Washoe Co.*, 41 Nev. 437, 171, Pac. 511, 1 W. C. L. J. 1088. See also *McLaughlin v. Industrial Board*, 281 Ill. 100, 117 N. E. 819, 1 W. C. L. J. 504. Townships as employers.

81. *Dunaway v. Austin St. R. Co.*, (Civ. App.), 195 S. W. 1157.

82. *Mihaica v. Mlagenevich & Gillespie and the City of Los Angeles*, 1 Cal. Ind. Acc. Com. (Part II) 174.

83. *Berren v. City of Venice*, 2 Cal. Ind. Acc. Com., 31; *Spears v. City of Santa Monica*, 2 Cal. Ind. Acc. Com. 941.

84. *Brown v. City of Decatur*, 188 Ill. App. 147.

85. *Radigen v. The Sanitary Dist. of Chicago*, 1 Bull. Ill. Ind. Bd. 138; *Canadian Northern R. Co. v. Green*, (Sask.) 30 D. L. R. 546. Holding Municipal Steel railway is liable for compensation.

86. Claim No. 407, *Myer v. Mayor and City Council of Baltimore*, First Ann. Rep. St. Ind. Com. of Md. (1914 & 15) 20.

87. *Luckey v. City of Newark*, 37 N. J. L. J. 117.

88. *In re Lyman*, 1 Bull. Ohio, Ind. Com. 182.

89. *State ex rel. Pratt v. City of Seattle*, 73 Wash. 396, 132 Pac. 45.

90. *Bettencourt v. Indus. Acc. Comm.*, 175 Cal. 559, 166 Pac. 323.

New York was not an employee of the City of New York, though his wages were paid by the city.⁹¹

Sections 2394-3 of the Wisconsin Act provides that an employer subject to the Compensation Act shall be liable for compensation to the employees of contractors under him where such contractors are not subject to the act. And it has been held that where the immediate employer of a garbage collector was not subject to the act, the City of Milwaukee was liable to an employee of such contractor when he was injured in the course of his employment.⁹²

The fact that a deputy sheriff is expressly excluded from the California Act, did not affect his right to compensation from his employer—a mining company. The deputy sheriff receiving no remuneration from the county.⁹³

“Employees of a state and its governmental agencies,” when not engaged in an enterprise carried on for pecuniary gain or profit are not within the operation of the Nebraska Workmen’s Compensation Act; therefore a janitor of a school district does not come within the act.⁹⁴

A fireman regularly appointed under the provisions of the charter of the city of New Haven is not an employee where the act defines an employee as any person who has entered into or works under any contract of service or apprenticeship with an employer.⁹⁵

The court in holding that the chief of firemen of the city of Chicago was not an employee, because he came within a class exempted under the act, as subject to receiving a pension from

91. *Muller v. City of New York*, 178 N. Y. S. 416, 189 App. Div. 363, 5 W. C. L. J. 105.

92. *City of Milwaukee v. Fera et. al.*, 170 Wis. 348, 174 N. W. 926, 5 W. C. L. J. 336.

93. *Engels Copper Mining Co. v. Ind. Acc. Comm.*, — Cal. —, 185 Pac. 182, 5 W. C. L. J. 134.

94. *Ray v. School Dist. of Lincoln*, — Neb. —, 1920, 181 N. W. 140. Nor a policeman. *Rooney v. City of Omaha*, — Neb. —, (1920), 181 N. W. 143. Modifying former opinion 177 N. W. 166.

95. *McDonald v. City of New Haven* — Conn. —, (1920), 109 Atl. 176, 5 W. C. L. J. 779.

a fund to which the city or state contributed, said: "The deceased would not have been, during his lifetime, entitled to receive compensation. Up until the very time of his death he was excepted from the provisions of the Compensation Act because by the provisions of sections 5 and 7 of the Pension Act he was entitled to compensation, and by the provisions of section 6 of the Pension Act his widow or minor children were entitled to compensation. Until his death it was not possible to determine that he would not be survived by a widow or minor children, and so it was not possible to determine until after his death that he would not leave surviving him "beneficiaries or heirs" to whom a pension would be payable from a fund to which the city had contributed. Whether or not a person is an employee within the meaning of the Workmen's Compensation Act must be determined from the situation existing during his lifetime. If during his lifetime deceased was not an employee of the city of Chicago within the meaning of the Workmen's Compensation Act, and not entitled to receive compensation under its terms, he cannot become an employee after his death. The fact that deceased died leaving no one surviving entitled to receive a pension under the Firemen's Pension Fund Act, could not, ipso facto, after his death bring the deceased within the provisions of the act from which he was excluded during his lifetime." ⁹⁶

Where a city employee was injured he must show in his declaration that the defendant was operating under the Illinois Act, and that he was engaged in a class of work which was hazardous, for there is no presumption that he comes under the act. ⁹⁷

§ 37. **Independent Contractors.**—Whether one is an employee or an independent contractor is often a close question and one of importance, because independent contractors are not en-

96. *City of Chicago v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 351, 6 W. C. L. J. 142; *State ex rel. Fletcher v. Carroll*, 162 Pac. 593, — Wash. —, B 1 W. C. L. J. 1611.

97. *Obrien v. Chicago City Ry. Co.*, — Ill. —, (1920), 127 N. E. 389, 6 W. C. L. J. 144. See § 3, Ill. Act. Am. 1921.

titled to compensation benefits from their principals, as they are not generally covered by the compensation acts,⁹⁸ except, if at all, in the capacity of employers.

The common law decisions on this question are of as much weight and authority as the decisions of courts and commissions in cases where the question arises out of claims for compensation. It was expressly held in an Ohio decision that the law of independent contractors was in no wise changed by the enactment of the Compensation Act,⁹⁹ which may be generally considered to be true. The questions to be determined, in deciding whether one is an independent contractor or an employee, are: "Who has the general control of the work? Who has the right to direct what shall be done? Who shall do it and how it shall be done? If the answer to these queries shows that this right remains in the employer, the relation of the independent contractor does not exist between the contractor and the employer. On the other hand, if the employer has not this privilege it does exist."¹

It has also been said that, "the test of an independent contractor is that he render service in the course of independent occupation, following the employer's desire in results² but not in means; but the employer's authoritative control is to be distinguished from mere suggestions as to detail, or necessary co-operation where the work is part of a larger undertaking."³

98. *State ex rel. Virginia & Rainy Lake Co. v. Dist. Court of St. Louis*, 128 Minn. 43, 150 N. W. 211, L. R. A. 1916a, n. 247, 7 N. C. C. A. 1076, 970; *Columbia School Supply Co. v. Lewis*, 63 Ind. App. 386, 115 N. E. 103; *Cinofsky v. Indus. Comm.*, 290 Ill. 521; *Tsangournas v. Smith*, 171 N. Y. S. 256, 17 N. C. C. A. 698.

99. *Buddinger v. Champion Iron Co.*, Vol. 1 No. 7, Bul. Ohio Indus. Com. p. 70; *Norton v. Day Coal Co.*, — Iowa —, (1920), 180 N. W. 905; *Kelley's Dependents v. Hoosac Lbr. Co.*, — Vt. —, 1921, 113 Atl. 818.

1. *Mason & Hodge Co. v. Highland*, (Ky.) 116 S. W. 320; *Tuttle v. Embury-Martin Lumber Co.*, 192 Mich. 385, 158 N. W. 875; 26 Cyc. 970, 15 N. C. C. A. 496; *Stricker v. Indus. Comm.*, — Utah —, (1920), 188 Pac. 849, 5 W. C. L. J. 920.

2. *Kelley v. Delaware, L. & Western R. Co.*, — Pa. —, 113 Atl. 419.

3. *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328, 15 N. C. C. A. 487; *Western Indemnity Co. v. Pillsbury*, 172 Cal., 807, 159 Pac., 721; *Pace v. Appanoose Co.*, 184 Ia. 498, 168, N. W. 916, 2 W. C. L. J. 884; *Franklin Coal & Coke Co. v. Indus. Comm.*, — Ill. —, (1921), 129 N. E. 811.

Each case must be determined on its own facts and ordinarily no one feature of the relation is determinative, but all must be considered together.⁴

It would, however, appear safe to say that one indispensable element to his character as an independent contractor is that he must have contracted to do a specific work and have the right to control the mode and manner of doing it.⁵ Other cases hold that the vital factor to establish the status of employer and employee as distinguished from principal and independent contractor is that of direction and control,⁶ another case, that one who contracts to do or get done certain work at a fixed price is not a workman within the meaning of the Compensation Act.⁷

Courts will sometimes disregard the contract and depend entirely upon the conduct of the parties in order to determine their relation,⁸ especially is this true if the contract appears to be only a colorable arrangement to enable the master to evade liability to a servant for failure to perform a duty imposed by law,⁹ however,

4. *McCoy v. Kirpatrick*, 1 Cal., 1 A. C. Dec. 599; *Wewinski v. Vite*, 1 Conn. Comp., Dec. 629.

5. *Powley v. Vivian & Co.*, 169 N. Y. App. 170, 154 Supp. 426, 10 N. C. C. A. 835. Citing *Alexander v. R. A. Sherman Sons Co.*, 86 Conn. 292, 85 Atl. 514; *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755; *Cunningham v. International Ry. Co.*, 51 Texas 503; *Andrews v. Boedecker*, 17 Ill., App. 213; *Indiana Iron Co. v. Gray*, 19 Ind. App. 585, 48 N. E. 803; *Parrott v. Chicago Great Western Ry. Co.*, 127 Iowa 419; 103 N. E. 352; *Williams v. National Register Co.*, 157 Ky. 836; 164 S. W. 112; *Smith v. State Workmen's Ins. Fund*, 262 Penn. 286, 105 Atl. 90, 3 W. C. L. J. 374; *Kelly's Dependents v. Hoosac Lbr. Co.*, — Vt. —, (1921), 113 Atl. 818.

6. *Hart v. Mammoth Copper Mining Co.*, 1 Cal. Ind. Acc. Com. (Part I), 77; *State ex rel. Va. & Rainy Lake Co. v. District Court of St. Louis Co.*, 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076; *Kasovitch v. Wattis Co.*, 2 Cal. Ind. Comm. 357; *Potterri v. Fidelity Coal Mining Co.*, 122 Pac. 120, 86 Kan. 774; *Chicago R. I. & P. Ry. Co. v. Bennett*, 128 Pac. 705, 36 Okla. 358; *Johnson v. Carolina C. & O. R. Co.*, 72 S. E. 1057, 157 N. C. 382; *Robideaux v. Herbert*, 118 La. 1089, 43 So. 887; *Linton v. Smith*, 8 Gray (Mass.) 147; *Richmond v. Sitterding*, 43 S. E. 562, 101 Va. 354, 99 Am. St. Rep. 879, 65 L. R. A. 445; *Meredosia Levee & Drainage Dist. v. Ind. Comm.*, 285 Ill. 68, 120 N. E. 516, 17 N. C. C. A. 683.

7. *Simmons v. Faulds*, 3 W. C. C. 169.

8. *Anderson v. Foley Bros.*, 124 N. W. 987, 110 Minn. 151.

9. *Nelson v. American Cement Plaster Co.*, 115 Pac. 578, 84 Kan. 797.

all the circumstances should be considered.¹⁰ So, too, it has been held that where one company is merely an instrument in the hands of another to evade liability both having the same officers and offices, a workman in the employ of one will be considered in the employ of both;¹¹ that the employees of a contractor did not become the employees of the company whose president directed them to proceed with work on a wall, assuring them that it was safe;¹² that one who is merely employed by the owner to superintend the work and hire employees is not liable for compensation to the employees;¹³ that an independent contractor may at the same time be an agent of the principal for whom he is doing the work so that the principal is liable for the contractor's negligence under the doctrine of respondent superior;¹⁴ that the rights of the employee under the Workmen's Compensation Law are not affected by the invalidity of his employer's subcontract.¹⁵

An employee in a junk yard was paid by the day after cars reached the yard, and were spotted, but until then he was to strip engines at \$4.00 per engine, using the tools of his employer. The court held that while the employee was stripping the engines he was not an independent contractor and injuries arising out of the employment of stripping the engines came within the protection of the compensation act.¹⁶

In another case the deceased worked for the defendant part of the time carting coal. He also obtained coal from the defendant at the "mine price" and delivered it to customers, receiving as compensation for his efforts the difference between the mine price and his selling price. On the day of the accident he came to the mine to procure coal for one of his customers and the defendant

10. *Travis v. Hobbs Wall & Co.*, 165 Ill. App. 481.

11. *Asplund v. Conklin Construction Co.*, 165 Ill. App. 44.

12. *Kaplan v. Friedman Construction Co.*, 148 App. Div. 14, 132 Supp. 233.

13. *Batchelder v. Charles W. Kreis and Mary E. Powers*, 1 Cal. In. Acc. Com. (Part II) 63.

14. *Norweigan Danish Methodist Epis. Church v. Home Tel. Co.*, 119 Pac. 834, 66 Wash. 511.

15. *Wausau Lumber Co. v. Ind. Comm.* 166 Wis. 204, 164 N. W. 836.

16. *Cinofsky v. Indus. Comm.* (1919), — Ill. —, 125 N. E. 286, 5 W. C. L. J. 185.

informed him that he had a delivery for him to make. Finally it was decided that he would first make the delivery to his customer and then haul the load for the defendant. He was killed soon after leaving the mine. The court in reversing an award said: "It is well recognized, in all cases brought under the act, that the burden is upon claimant to furnish the evidence from which the inference can reasonably be drawn that the injuries or death were caused by an 'accident arising out of and in the course of his employment,' within the meaning of the workmen's compensation act."¹⁷

Where the claimant hauled garbage in his own truck furnishing the gasoline for it, the cans being handled by others, it was held that he was an independent contractor though paid \$25.00 per day for himself and truck.¹⁸

Where there is a written contract of employment, the question whether or not the relation is one of employer and employee or employer and independent contractor, is to be determined from the contract.¹⁹

§ 38. Workmen Held Independent Contractors not Employees.

—In the following cases the workmen were held to be independent contractors and not employees. One who agreed with the respondent to build a silo for \$20.00, respondent to furnish the foundation, the materials, and a helper but having no directive rights over the work;²⁰ one who undertook to do a job of slate roofing for a fixed sum;²¹ a workman who agreed to cut and pile wood on the defendant's land for a fixed rate per cord, cutting as much as he pleased and when he pleased and working part of the time for other people;²² a teamster who did general hauling and

17. *Sugar Valley Coal Co. v. Drake*, —Ind. App. —, 117 N. E. 937, 11 N. C. C. A. 254.

18. *State Indus. Comm. v. Wiseman*, 183 N. Y. S. 112, 6 W. C. L. J. 481.

19. *LaMay v. Indus. Comm.*, —Ill. —, (1920), 126 N. E. 604, 5 W. C. L. J. 797.

20. *Boyington v. Stoddard*, 1 Conn. Comp. Dec. 103.

21. *Perham v. American Roofing Co.*, 193 Mich. 221, 159 N. W. 140, 15 N. C. C. A. 489; *Barnes v. Evans & Co.*, 7 B. W. C. C. 24.

22. *Benoit v. Bushnell*, 1 Conn. Comp. Dec. 172; *Snow v. Winkler*, 1

was hauling bags of a cement company at 25 cents per trip;²³ a whitewasher who entered into a contract to do a job of whitewashing for a certain price and to furnish the necessary material and labor;²⁴ a taxicab driver receiving one-fourth of the proceeds for his services in operating the company's car;²⁵ a man who agrees to paint a building and to receive a certain amount while he works and is at liberty to hire an assistant for whom he received the same amount, but on whose services he makes a profit, the owner of the building furnishing the material;²⁶ one contracting to erect a building and deliver it completed, hiring his own assistants, who is not, as to details, subject to the direction of the company building it;²⁷ a carpenter who agreed to build a barn for the respondent, being paid by the hour, but hiring other men, and making some profit on their wages as well as on the materials furnished by him, and doing the work from general plans without any supervision as to methods;²⁸ a decorator who agreed to paper a house being erected, the decorator to have complete liberty as to the hours of work;²⁹ a number of associated workmen working under the direction and control of one of their number as their leader and business manager, who are treated collectively under a common firm name as directed by the leader;³⁰ a number of

Conn. Comp. Dec. 76; *Donlon Bros. v. Industrial Acci. Comm.*, 173 Cal. 250, 159 Pac. 715; *Fidelity etc., Co. v. Brush*, 176 Cal. 448, 168 Pac. 890, 1 W. C. L. J. 153.

23. *In re Stull*, Ohio Ind. Comm. No. 117139, Oct. 4, 1915, *Flickenger v. Indus. Comm.*, — Col. —, (1919), 184 Pac. 851, 5 W. C. L. J. 8; *In re Wm. Musolf* 3rd. A. R. U. S. C. C. 152.

24. *McDermott v. Grindal & Sons*, Ill. Ind. Bd., Aug. 3, 1914; *Fincklestein v. Balkin*, 103 Supp. 99; *Hungerford v. Bonn*, 183 App. Div. 818, 171 N. Y. S. 280, 2 W. C. L. J. 682; *Kackel v. Serviss* 180 App. Div. 54, 167 N. Y. S. 348, 1 W. C. L. J. 235; *Holbrook v. Olympia Hotel Co.*, 200 Mich 597, 166 N. W. 876, 1 W. C. L. J. 1076.

25. *Smith v. General Motor Cab Co., Ltd.*, 80 L. J. K. B. 839, 1 N. C. C. A. 576.

26. *Wright v. Barnes, and Fidelity & Casualty Co.*, 1 Conn. Comp. Dec. 260, 248.

27. *Edmonson v. Coca-Cola Co.*, —, Tex. Civ. App. —, 150 S. W. 273.

28. *Crittenden v. Robbins*, 1 Conn. Comp. Dec. 523.

29. *Lewis v. Stanbridge*, 6 B. W. C. C. 568.

30. *Penas v. Utah Construction Co.*, 2 Cal. Ind. Acc. Com. 749; *Kasvitch v. L. R. Wattis Co.*, 2 Cal. Ind. Acc. Com. 357.

men engaged under the claimant to chop down trees for a lump sum for the job, which was to be distributed among the gang by arrangement among themselves;³¹ a salesman and collector on a purely commission basis who employed various persons to help him, furnished his own conveyance and invested some of his own capital in the business;³² two men who were owners of a corn cutter hired out the machine with their own services, to various farmers to cut corn for silos at the rate of \$2.00 an hour, while actually engaged, for the machine and their services;³³ a teamster paid per load for one definite service, producing one agreed result, having full control of his team, his time, his methods of work, as to whether or not he hired help and of all details except as to what is to be hauled, teaming as such being his regular business;³⁴ M. Co. who agreed to furnish night watchmen to the owners of piers, where cargo were stored and the M. Co. had the sole right of hiring and discharging the watchmen;³⁵ a plasterer theretofore doing journeyman work, who makes an oral contract to do a plastering job for a lump sum and is given free hand to employ assistants, and takes risks of profit and loss, and is not to be controlled or supervised;³⁶ the owner of a concrete mixer who agreed to build culverts for a town at the rate of \$15.00 per day for himself, the machinery and three other employees;³⁷ one who agreed to blast and break up stone to be used by the respondents for building purposes, receiving wages per day, but using his

31. *Curtis v. Plumtre*, 6 B. W. C. C. 87; *Gilmore v. Sexton*, 1 Cal. I. A. C. Dec. 257; *Rose v. Pickrell*, 1 Cal. I. A. C. Dec. 85; *Soloski v. Strickland*, 1 Conn. Comp. Dec. 564; *Helton v. Tall Timber Lumber Co. of La.*,—La.— (1920), 86 So. 729, 7 W. C. L. J. 299.

32. *Fineblum v. Singer Sewing Machine Co.*, 1 Conn. Comp. Dec. 126. *In re James Reed*, 3rd A. R. U. S. C. C. 152.

33. *Busse v. Brugger*, Third Annual Report (1914), Wis. Ind. Com. 78, *LaMay v. Indus. Comm.*, — Ill. — (1920), 126 N. E. 604, 5 W. C. L. J. 797.

34. *McCoy v. Kirkpatrick*, 1 Cal. I. A. C. Dec. 599; *Ryland v. Harve M. Wheeler Lumber Co.*, — La. —, (1920), 84 So. 55, 5 W. C. L. J. 850.

35. *Oberg v. W. J. McRoberts & Co.*, 6 N. Y. St. Dep. Rep. 386.

36. *Baker v. Armstrong*, 2 Cal. I. A. C. Dec. 1057; *In re Thomas Proud Dinwiddie Cons't Co.*, 2nd A. R. U. S. C. C. 207.

37. *Day v. Ellington*, Third Annual Report (1914), Wis. Ind. Com. 74.

own tools and providing the dynamite and assistants used, and being under no direction or duty from the respondent;³⁸ a carpenter working in a shop on materials furnished by the employer and receiving \$1.00 an hour for his services, while thus working using the tools and appliances of his shop;³⁹ a man working under contract to cut fire wood at a certain price per cord, he agreeing to furnish his own tools and determining his own hours of labor;⁴⁰ a man who verbally agreed to break steel and clear cinders at so much per ton, and who employed five or six men to assist him and was paid weekly;⁴¹ a workman who entered into a written agreement with a mining company to carry out specific blasting operations, where the mining company had exercised no control over the men apart from the agreement;⁴² a mine owner, giving another a contract to mine, reserved no rights to interfere with details of the work, but only required it to be done in conformity with the contract and the mining rules;⁴³ a member of a copartnership working under a subcontract;⁴⁴ the members of a partnership which entered into a contract with a contractor to install certain machinery, one of the partners, living at the place of business being injured while helping to unload machinery billed to the contractor;⁴⁵ a rabbit trapper who was paid according to the number of animals caught, the principal furnishing the traps and the use of a cottage while the man was thus engaged;⁴⁶ one who agreed to cut mine props at a specified sum each, he employing his own assistants and receiving no directions as to how to

38. *Wowinski v. Vito*, 1 Conn. Comp. Dec. 629.

39. *Crittenden v. Dr. B. B. Robbins Bristol Trucking Co.*, 1 Conn. Comp. Dec. 523.

40. *Donlon Bros. v. Industrial Acc. Com.*, 173 Cal. 250, 159 Pac. 715. 15 N. C. C. A. 492; *Parsons v. Industrial Acc. Com.* 178 Cal. 394, 173 Pac. 585, 2 W. C. L. J. 619.

41. *Vamplew and others v. Pargate Iron & Steel Co.*, 88 L. T. 756, 5 W. C. C. 114. C. A.

42. *Reid v. Leltch Collieries*, 7 B. W. C. C. 1017.

43. *Merriweather v. Sayre Mining & Mfg. Co.*, 49 So. 916, 161 Ala. 441.

44. *Kasovitch v. L. R. Wattis Co.*, 2 Cal. Ind. Acc. Com. 357.

45. *Anderson v. Perew*, 2 Cal. Ind. Acc. Com. 727.

46. *McConnell v. Galbraith*, 7 B. W. C. C. 968.

do the work;⁴⁷ a principal voluntarily assisting a contractor who was doing work for him;⁴⁸ a stage hand who carried baggage for different theatre troupes when he was not busy doing work at the theatre of his employer;⁴⁹ one who agreed to drag some logs with his horse, being paid a certain sum per day, and was not obliged to do the work himself but might have sent a servant;⁵⁰ a man who had contracted with the harbor commissioners to furnish a yawl and four men to work a pilot station and was drowned while taking a pilot out to a ship in the harbor, he being under no obligation to do the work personally;⁵¹ one employed to move machinery at cost plus ten per cent employing and directing his assistants and being paid for his own time when he worked;⁵² a stone contractor employed by a general contractor to do the stone work on a building supplying his own tools, equipment and laborers;⁵³ one contracting to furnish an engine, men and team to a county for grading work at a fixed daily pay;⁵⁴ one hired to move some building material in his own way through his own servant;⁵⁵ the mere fact that a workman is requested to construct a building in a certain way is not conclusive that he is not an independent contractor;⁵⁶ a farmer engaged by contractor to do hauling for a price per team;⁵⁷ a woman who hauled farmers' milk to the plant of a manufacturer of milk products, controlling

47. *Sickle v. Pierson*, 37 N. J. Law J. 15; *Clark v. Tall Timber Lbr. Co.*, 140 La. 380, 73 So. 239.

48. *Artenstein v. Employer's Liability Assur. Corp.*, 2 Mass. Ind. Acc. 699.

49. *Huscroft v. Bennett*, 7 B. W. C. C. 41.

50. *Chisolm v. Walker & Co.*, 2 B. W. C. C. 261.

51. *Walsh v. Waterford Harbor Commissioners*, 7 B. W. C. C. 960 C. A.

52. *Carleton v. Foundry etc. Products Co.*, 199 Mich. 148, 165 N. W. 816, 1 W. C. L. J. 410, 15 N. C. C. A. 492.

53. *Mobley v. Rogers Co. (Ind. App.)*, 119 N. E. 477, 2 W. C. L. J. 47.

54. *Pace v. Appanoose County*, 184 Ia. 498, 168 N. W. 916, 2 W. C. L. J. 884.

55. *In re Comerford*, 224 Mass. 571, 113 N. E. 460, 1 W. C. L. J. 793.

56. *Connolly v. Industrial Acc. Com.*, 173 Cal. 405, 160 Pac. 239, 15 N. C. C. A. 490.

57. *Zeitlow v. Smock*, 64 Ind. App., v. 117 N. E. 665, 1 W. C. L. J. 174.

her own equipment and receiving payment from the farmers through the agency of the manufacturer;⁵⁸ an owner of teams and horses who let them with drivers to a company at a rate per hour, paying the drivers, and driving a team himself, and who was injured in management of the horses of his team;⁵⁹ one who was engaged in the business of stable keeping, teaming and jobbing and let to a town for work on its road a cart, a pair or horses, and himself for an undivided price of \$600 per day;⁶⁰ one employer to remove trees preparatory to grading street, to be paid in lump sum, he furnishing his own tools, controlling his own time, etc.;⁶¹ one employed to cut with his own tools, such timber as in his judgment was best suited to his purpose in converting it into units for which he was to be paid and over which his employer exercised no control;⁶² a contract providing for digging a tunnel for an express consideration, but contained no reservation of any control of the work more than was necessary to insure its producing the result provided;⁶³ where a drainage district supervised a ditch cleaning operation as to results only, while the person injured operated his own machine, furnished his own workmen, and directed the manner of work for a per diem compensation, the latter was an independent contractor;⁶⁴ a painter, agreeing to paint three smokestacks for a corporation where has absolute control of himself and his helper as to the time when he is to begin work, and as to where he shall commence, unhampered by directions from the corporation and not subject to its discharge;⁶⁵ a painter, working by the job and by the hour on the residence of his employer,

58. *Sawtels v. Ekenberg Co.*, 206 Mich. 246, 172 N. W. 581, 4 W. C. L. J. 252.

59. *Centrello's Case*, 232 Mass. 456, 122 N. E. 560, 3 W. C. L. J. 740.

60. *Winslow's Case*, 232 Mass. 458, 122 N. E. 561, 3 W. C. L. J. 741.

61. *Stern v. Thompson*, (Iowa) 3 W. C. L. J. 470; *Roach v. Hibbard & Gifford*, 184 N. Y. Supp. 418 (1920), 7 W. C. L. J. 130.

62. *Parsons v. Industrial Acc. Comm.* 178 Cal. 394, 173 Pac. 585, 2 W. C. L. J. 619.

63. *Industrial Comm. v. Maryland Casualty Co.*, 65 Colo. 279, 176 Pac. 288, 3 W. C. L. J. 95.

64. *Meredosia Levee and Drainage Dist. v. Ind. Comm. of Illinois*, 285 Ill. 63, 120 N. E. 516, 3 W. C. L. J. 24.

65. *Litts v. Riley Lumber Company*, 120 N. E. 730, 224 N. Y. 321.

and who hired his own assistants;⁶⁶ a workman who transferred freight from one railroad to another at a specified price per ton;⁶⁷ a man engaged in trucking business, owning own trucks, who hauls for another and is permitted to haul as he pleases without reporting before or after work.⁶⁸

"The right to supervise, control and direct the work in one of the tests for determining whether a person is an independent contractor or an employee, but it is not the sole and only test. One who takes contracts for cleaning and painting the walls of brick buildings, agreeing to furnish his own tools, scaffolding, and materials, to employ his own help, keep his own time, to furnish workmen's compensation insurance for the workers whom he employs, who is under no obligation to do the work in person, who is paid on weekly estimates 50 per cent of the value of the work done, the balance being reserved until the completion or acceptance of the work, is an independent contractor, and not an employee under the Workmen's Compensation Act."⁶⁹

One employed to draw logs at \$2.50 a cord, furnishing his own team and doing the work at his own convenience, was an independent contractor.⁷⁰

A painter who agreed to paint a certain number of windows for an agreed amount and was doing the work in his own manner and using his own brushes, was an independent contractor.⁷¹

Where a contractor when asked to do some plastering for the owner of a house sent a plasterer, who furnished the material, kept his own time and did the work in his own manner, and it was the plasterer's practice to render a bill for labor and materials to the contractor, the plasterer was held to be an independent contractor.⁷²

66. *Hungerford v. Bonn*, 171 N. Y. S. 280, 2 W. C. L. J. 682.

67. *Smith v State Workmen's Ins. Fund*, 105 Atl. 90, 17 N. C. C. A. 696.

68. *Flickenger et al. v. Ind. Acc. Comm. et al.* (Cal.), 184 Pac. 851, 5 W. C. L. J. 8.

69. *Barrett v. Selden-Breck Construction Co.*, 103 Neb. 850, 174 N. W. 866, 5 W. C. L. J. 291.

70. *Robichaud's Case*, 234 Mass. —, 124 N. E. 890, 5 W. C. L. J. 247.

71. *Prince v. Schwartz et al.*, 190 App. Div. 820, 180 N. Y. S. 703, 5 W. C. L. J. 727.

72. *Woodhall v. Irwin et. al.*, 201 Mich. 400, 167 N. W. 845, 2 W. C. L. J. 296.

Where a man was employed to cut wood at a fixed sum per cord using his own method and time, he was held to be an independent contractor and where he had his son helping, the son to receive half of the fathers remuneration, the son was also considered an independent contractor.⁷³

One who contracts to remove freight from the cars of one road to the cars of another, having full control over the manner of doing the work, was held to be an independent contractor,⁷⁴ and one engaged to assist him was not entitled to compensation from the one for whom he contracted to perform the work.⁷⁵

Where a decedent furnished and erected a scaffold from which he fell while painting a sign, he was held to have been an independent contractor.⁷⁶

In a recent Massachusetts case the court said: "The undisputed facts shown by the record and found by the Industrial Accident Board are that at the time of the injury the claimant with his team was hauling a load of ashes for the town of Lee to be used in the construction of a public way. It was provided by his contract of employment that he should furnish the team, feed, take care of and drive the horses for a fixed daily remuneration. The entire management and mode of transportation were under his control and the only orders given by the town's foreman were to direct him where to go for the ashes and after the ashes had been loaded, in which work he took no part, to dump the ashes at a designated place. It is plain as a matter of law under *McAlister's Case*, 229 Mass. 193, 118 N. E. 326, *Centrello's Case*, 232 Mass. 456, 122 N. E. 560, and *Winslow's Case*, 232, Mass. 458, 122 N. E. 561; that

73. *Fidelity & Deposit Co. of Maryland et al. v. Brush et al.*, 176 Cal. 448, 168 Pac. 890, 1 W. C. L. J. 153, 15 N. C. C. A. 489; *Clark v. Tall Timber Co.*, 140 La. 380, 73 So. 239, 15 N. C. C. A. 489; *In re Anna M. Lutz*, 2nd A. R. U. S. C. C. 219.

74. *Smith v. State Workmen's Ins. Fund*, 262 Pa. 286, 105 Atl. 90, 3 W. C. L. J. 374, 17 N. C. C. A. 691.

75. *Zoltowski v. Lernes Coal & Lumber Co.*, —Mich.—, 183 N. W. 11 (1921).

76. *Rheinwald v. Builders' Brick & Supply Co.*, 223 N. Y. 572, 119 N. E. 1074, 17 N. C. C. A. 683.

when injured he was not an employee of the town but an independent contractor. It having been rightly held and ruled by the board that there could be no recovery under St. 1911, c. 751, and amendatory acts, the decree dismissing his claim for compensation must be affirmed."⁷⁷

A mail carrier was held to be an independent contractor where the route was let to the lowest bidder.⁷⁸ Special delivery messengers are employees of the United States.⁷⁹ Where a contractor drove a team himself it did not change his status to that of an employee.⁸⁰

§ 39. **Workmen Held Employees and not Independent Contractors.**—In the following cases the workmen were held to be employees and not independent contractors: A cook on a monthly salary put in charge of a boarding house by a manufacturing company under whose direction and control the work was to be done, and the cook to have in addition to his salary all profits from boarding the company's employees.⁸¹ A company engaged in building operations employed two brothers to hire and pay all its employees for which the brothers received by way of wages a lump sum without account being kept of their time.⁸² A mason employed at a stated sum per hour to hire other men and work according to the employer's plan, though the latter exercised no control over the workmen employed by such mason.⁸³ A vaudeville actress employed on a vaudeville circuit, though she furnished her own costumes and skates.⁸⁴ A man was employed by a company to superintend the construction of a building and hire

77. *Eckert's Case*, 233 Mass. 577, 124 N. E. 421, 4 W. C. L. J. 713.

78. *In re Aaron W. Wallace*, 3rd A. R. U. S. C. C. 152; *In re Wm. J. Scott*, 2nd A. R. U. S. C. C. 208; *In re Wm. Nicholas*, 2nd A. R. U. S. C. C. 212.

79. *In re Jacob Cahan*, 2nd A. R. U. S. C. C. ,208.

80. *Norton v. Day Coal Co.*, — Ia —, 180 N. W. 905.

81. *Michael v. Western Salt Co.*, 2 Cal. I. A. C. Dec. 501. ,

82. *De Palma v. The Home Construction Co.*, 1 Conn. Comp. Dec. 358.

83. *Maddix v. Hotchgreve Brewing Co.*, 154 Wis. 448, 143 N. W. 189. *In re Melbourn G. Meyers*, 2nd A. R. U. S. C. C. 219.

84. *Howard v. Republic Theater*, 2 Cal. I. A. C. Dec. 514.

men to do the work, the company furnishing the money to pay the men, also the materials for building.⁸⁵ A carpenter employed periodically at a daily wage by a shop owner in whose shop he is put to work to fill an order for window frames on the basis of twenty-five cents per frame.⁸⁶ A driver employed for no definite time to haul logs for a lumber company and subject to the company's right to discharge him at any time, the work being done under the control of the company both as to time and place.⁸⁷ A man employed to collect cream and deliver butter at a stipulated wage, receiving an additional amount for the use of his automobile, and to hire a helper, the employer exercising full control over both the man and his helper.⁸⁸ Bowling alley boys working periodically at setting up pins and receiving twenty-five per cent of the amount received by the owner of the alleys for each game served by the boys.⁸⁹ A laborer engaged in felling specified trees and cutting them into cord wood at \$1.00 per cord, out of which he paid helpers at the same rate he himself received.⁹⁰ One employed by a manufacturing Company to squeeze boxes in its factory at so much per box, with the right to hire and pay his own assistant, receiving a stipulated price per box, but using the company's machinery and doing the work as and when directed by its foreman.⁹¹ A mechanic to put on lath in a state institution at twenty-five cents a bunch, who was authorized

85. *Rankel v. Buckstaff-Edwards Co.*, 120 N. W. 269, 138 Wis. 442, 20 L. R. A. (N. S.) 1180.

86. *Hale v. Johnson*, 2 Cal. I. A. C. Dec. 339.

87. *Tuttle v. Embury-Martin Lumber Co.*, 192 Mich. 385, 158 N. W. 875; 15 N. C. C. A. 496; *Van Simaey v. Cook Co.*, 201 Mich. 540, 167 N. W. 925, 2 W. C. L. J. 323; *Western Indemnity Co. v. Prater*, — Texas —, 213 N. W. 355, 4 W. C. L. J. 455.

88. *Golden v. The Delta Creamery Co.*, 2 Cal. Ind. Acc. Com. 743, 12 N. C. C. A. 385.

89. *Weaver v. Eyster & Stone*, 1 Cal. I. A. C. Dec. 563.

90. *Pearce v. Frapwell*, 3 Cal. Ind. Acc. Com. 75; *Fischer v. Dunshee*, 2 Cal. Ind. Acc. Com. 849.

91. *Messmer v. Bell & Coggeshall Co.*, 117 S. W. 347, 133 Ky. 19; *Aisenberg v. C. F. Adams Co.*, — Conn. —, (1920) 111 Atl. 591, 7 W. C. L. J. 28; *Franklin Coal & Coke Co. v. Indus. Comm.* — Ill. —, (1920), 129 N. E. 811.

to secure other men to help him to whom he paid the same amount.⁹² A quarry worker paid a stipulated price for each day worked, although he was allowed to choose his own helpers and use his judgment as to where to work.⁹³ A plumber hired to fix some pipes, and supplied with materials by the owner who superintended the work and paid him by the hour.⁹⁴ Where A arranged with B to cut wood for \$4.50 a cord and B arranged with C to do the work for \$4.25 a cord and C arranged with D to do the work for \$4.00 a cord and D was injured at the work, A was his employer.⁹⁵ A worker who hauled stones at a stipulated price per day and was allowed to work for other people when not badly needed by his first employer.⁹⁶ One who employed carpenters to erect a building, directed the details of the work paid the carpenters and had the right to discharge them, but looked to the owner of the building to reimburse him for the carpenter's wages.⁹⁷ A construction superintendent who had great liberty of action as to purchase of material and manner of construction by reason of having a peculiar skill and knowledge as the inventor of an apparatus used in construction work.⁹⁸ A member of a partnership employed by the principal contractor on a building to do the glazing work and was injured while overseeing the unloading of glass for the contractor when it arrived for which he received compensation additional to that received under the partnership contract for the glazing work.⁹⁹ A person employed to collect bills for about two hours

92. *Jones v. Commonwealth of Mass.*, 2 Mass. Ind. Acc. Bd. 721; *McNally v. Diamond Mills Paper Co.*, 223 N. Y. 83, 119 N. E. 242, 2 W. C. L. J. 110.

93. *Paterson v. Lockhart*, (1905), 7 F. 954 Ct. of Sess.

94. *McNally v. Fitzgerald* (1914) 7 B. W. C. C. 24 C. A.

95. *Lachuga v. Kataoka*, 2 Cal. Ind. Acc. Com. 764, .

96. *O'Donnell v. Clare County Council*, 6 B. W. C. C. 457 C. A.

97. *Batley v. Stanage*, 3 Cal. Ind. Acc. Com. 288; *Yolo Water etc., Co., v. Industrial Acc. Comm.*, 35 Cal. App. 14, 168 Pac. 1146, 1 W. C. L. J. 499.

98. *Turner v. Oil Pumping and Gasoline Co.*, 2 Cal. Ind. Acc. Com. 471. *Rosedale Cemetery Assn. v. Industrial Acc. Comm.* 37 (Cal.) App. 706, 174 Pac. 351, 2 W. C. L. J. 754.

99. *Dyer v. James Black Masonry and Contracting Co.*, 192 Mich. 400, 158 N. W. 959.

per day at a compensation agreed upon at the time and, with one unimportant exception, was not employed by anyone else.¹ A miner employer to mine coal at a fixed price per ton, using his own tools and being paid extra for timbering.² One employed to draw pillars in a coal mine at a certain price per ton, but working under the same rules and control as the other employees.³ A person who makes a series of subcontracts all of which are guaranteed by the employer, merely as a subterfuge in an attempt to escape liability under the Compensation Act.⁴ A foreman, as to those employees that do not know that he has an independent contract with his principal.⁵ A window washer employed by a janitor of a public school regularly, twice a year, at a sum based upon the time estimated to complete the work.⁶ A man employed to haul milk at a certain price per gallon, who furnished his own horse and wagon.⁷ Two wood choppers cutting wood at a stipulated price per cord, who at the suggestion of their employer hired a third person to help them, the compensation being divided equally among the three.⁸ A carpenter working for a lump sum for his labor, the amount thereof being estimated upon the number of days required to finish the work, and he not supplying the materials or paying his assistants, and being subject to the direction of the owner.⁹ A person who contracted to care for 176 naptha lights, receiving a stipulated

1. *Shouler v. Jacob Greenberg*, 1. Cal. Ind. Acc. Com. (Part 11) 146, 11 N. C. C. A. 382.

2. *Cangreme v. Alberta Coal Mining Co.*, 7 B. W. C. C. 1020; *Indiana Window Glass Co. v. Mauck*, — Ind. App. —, 128 N. E. 451, 6 W. C. L. J. 657.

3. *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673.

4. *Mezansky v. Sissa*, 1 Conn. Comp. Dec. 430.

5. *Summers v. National Tent and Awning Co.*, 2 Cal. Ind. Acc. Com. 778; *Bowie v. Coffin Valve Co.*, 86 N. E. 14, 200 Mass. 571; *McClure v. Detroit Southern R. Co.*, 109 N. W. 847, 146 Mich. 457.

6. *Sabini v. Loura*, 3 Cal. Ind. Acc. Com. 354.

7. *Clark v. Ballieborough Co-operative Agricultural & Dairy Society Ltd.*, 47 Ir. L. T. R. 113 C. A.

8. *Bush v. Union Commission Co.*, 2 Cal. Ind. Acc. Com. 632.

9. *Holmes v. Japan Beautiful Nippon Kyos in Kaisha, Inc.*, 2 Cal. I. A. C. Dec. 894; *Kackel v. Serviss*, 180 App. Div. 54, 167 N. Y. S. 348, 1 W. C. L. J. 235; *Thompson v. Twiss*, 90 Conn. 444, 97 Atl. 328.

amount per light, and engaged other men to assist him, and the employer retained the right to direct him as to the way, means and manner of doing the work.¹⁰ A man hired to haul stone from a quarry, and paid a fixed sum per load.¹¹ A woodworker engaged to cut pieces of wood and put them together into lamps, receiving thirty-five cents per lamp, and allowed to hire two helpers to expedite the work, but using the employer's machinery and material.¹² A ship's mate, who employed its sailors.¹³ A contractor who agreed to superintend certain building and clearing work in accordance with instructions from the property owner.¹⁴ One employed by the hour, using either his own wagon or one of defendants, and subject to discharge at any time.¹⁵ One employed by a contractor as a superintendent of construction.¹⁶ One employed by a contractor to supervise the work of wrecking a smokestack for \$140, with a guarantee that if it did not amount to \$5.00 per day the contractor would make up the deficiency.¹⁷ A real estate agent agreeing to devote his entire time to selling his employer's lots on a commission.¹⁸ A bread salesman who was paid a per cent of the retail price of the bread he sold.¹⁹ A journeyman paperhanger, hired by the foreman

10. *Dodge v. Massachusetts Employees Insurance Ass'n.*, 1 Mass. Ind. Acc. Bd. 52.

11. *Howell v. Thomas*, 120 L. T. Jo. 79 C. A.; *Jones v. Penwyllt Dinas Silica Brick Co.*, 6 B. W. C. C. 491; *Evans v. Same*, 4 W. C. C. 101.

12. *Shaffer v. Southern California Hardwood Mfg. Co.*, 2 Cal. Ind. Acc. Com. 886.

13. *Nelson v. Western Steam Nav. Co.*, 100 Pac. 325, 52 Wash. 177.

14. *Opitz v. Hoertz*, 194 Mich. 626, 161 N. W. 866, 15 N. C. C. A. 498; *Welden v. Skinner, etc., Corp.* 103 Wash. 243, 174 Pac. 452, 2 W. C. L. J. 860; *Wislow v. Wellington*, — N. H. — (1920) 111 Atl. 631, 7 W. C. L. J. 85.

15. *Columbia School Supply Co. v. Lewis*, 63, Ind. App. 386, 116 N. E. 1.

16. *Otis Elevator Co. v. Miller*, 153 C. C. A. 302, 240 Fed. 376.

17. *American Steel Foundries v. Industrial Board*, 284 Ill. 99, 119 N. E. 902, 2 W. C. L. J. 463; *Cummings v. Underwood Silk Fabric Co.*, 184 App. Div. 456, 171 N. Y. S. 1046, 2 W. C. L. J. 923.

18. *Brown v. Industrial Acc. Comm.*, 174, Cal. 457, 163 Pac. 664; *Cameron v. Pillsbury*, 173 Cal. 83, 159 Pac. 149, 14 N. C. C. A. 496.

19. *Easton v. I. A. Comm. of Cal.*, 34 Cal. App. 321, 15 N. C. C. A. 491, 167 Pac. 288.

of a department store, and directed by the foreman, whenever such work was required by a purchaser, to go to the purchaser's residence and hang paper and paid by the roll with expenditures for carfare and paste.²⁰ An employee who is paid by the ton for unloading coal and hires and pays his own help, the employer retaining control over the manner in which the coal is to be unloaded and having the right to discharge him at any time without reason.²¹ Four men who agreed to go with the owner to prune his vineyard at a fixed price per acre, they being directed and controlled by the owner.²² An awning remover, working for any one needing his services, who is engaged to do piece work for a house owner who retains control and direction of the work with the right to discharge him for disobedience.²³ A foundry worker, unloading coke from freight cars for a certain sum per ton, where there is no contract to unload a certain number of tons or work for a certain period of time, the worker having the right to quit and the foundry company having the right to discharge him at any time without liability.²⁴ A carpenter, working by the hour and paid weekly by a miller to make additions and repairs at the mill under the miller's supervision, first working a few weeks in September and later returning to do more work in November.²⁵ An association formed as a medium of employment of members, collecting their pay and distributing same without deduction and without control over the work of the members is not an independent contractor.²⁶ Musicians, although furnished by the leader twice each week to play in an amusement

20. *In re McAllister*, 118 N. E. 326, 229 Mass. 193, 1 W. C. L. J. 618; *Board of Commissioners of Green County v. Shertzer*, — Ind. App. —, (1920), 127 N. E. 843, 6 W. C. L. J. 310.

21. *Decatur R. & Light Co. v. Ind. Bd.* of Ill., 276 Ill. 472, 114 N. E. 915, 15 N. C. C. A. 495; *Kelley v. Delaware, L. & W. R. Co.*, — Pa. —, 113 Atl. 419, 8 W. C. L. J. 130.

22. *Gulsti v. Covell Bros. et al.*, 5 Cal. I. A. C. Dec. 137.

23. *Abromowitz v. Hudson View Const. Co.*, 177 N. Y. S. 187, 188 App. Div. 356, 4 W. C. L. J. 538.

24. *Muncie Foundry & Machine Company v. Thompson*, 123 N. E. 196 (Ind. App.), 4 W. C. L. J. 56.

25. *Caca v. Woodruff*, 123 N. E. 120 (Ind. App.), 4 W. C. L. J. 51.

26. *Holcomb v. Standard Oil Co., et al.*, 5 Cal. I. A. C. D. 240.

park, who stipulated the amount of compensation they were to receive, were not employees of an independent contractor.²⁷ A mechanic, engaged by defendant to take down an old smokestack and put up a new one, who used his own appliances and furnished needed help, in addition to two men assigned by his employer, and who had charge of the work and was told to present his bill, and whose heirs after his death were paid a bill for work done by the hour, was an employee and not an independent contractor.²⁸ The mere fact that compensation is fixed on the amount of work done, rather than on the amount of time, does not make a workman an independent contractor.²⁹

A man hired to work by the day, as soon as certain work was ready, and pending the commencement of the work was engaged in stripping engines at an agreed sum per engine, using tools of employer.³⁰

Where a man furnished a truck and his own services for definite hours during the day, under the direction and control of the company, and agreed to so work for six months.³¹

An excavation contractor, under an agreement by which he was to receive the use of timbers and blocking, in return for his services and the use of his engine and derrick by the shoring contractor, his subcontractors, and their employees, when rendering such services.³²

A journeyman tailor, working at home on piece work was held to be employee.³³

A special delivery letter carrier was held to be an employee.³⁴

27. *Boyle v. Mahoney & Tierney*, 103 Atl. 127, 92 Conn. 404. I. W. C. L. J. 937.

28. *Cummings v. Underwood Silk Fabric Co.*, 184 N. Y. App. Div. 456, 171 N. Y. S. 1046.

29. *Komula v. General Acc., etc., Assur. Corp.* 165 Wis. 520, 162 N. W. 919.

30. *Cinofsky v. Ind. Comm. (Ill.)* 125 N. E. 286, 5 W. C. L. J. 185.

31. *Eng-Skell Co. v. Ind. Acc. Comm. (Cal. App.)* 186 Pac. 163, 5 W. C. L. J. 352.

32. *Mandatto v. Hudson Shoring Co.*, 190 App. Div. 71, 179 N. Y. S. 458, 5 W. C. L. J. 436.

33. *Liberatore v. Friedman*, 224 N. Y. 710, 121 N. E. 876, 17 N. C. C. A. 688.

34. *In re Jacob Cahan*, 2nd A. R. U. S. C. C. 208.

A mechanic repairing engines for contractors at a specified rate per hour, varying with the class of work performed by him, for which he rendered a bill for the gross amount, without itemizing it, his wages forming a part of the payroll upon which the insurance premium was paid, is an employee and not an independent contractor.³⁵

§ 40. **Owner of Premises as Employer of the Employees of his Contractors and Subcontractors.**—Most of the compensation acts expressly or impliedly provide that any person who has work done under contract on or about his premises, which is an operation of the usual business which he there carries on, shall be deemed an employer and shall be liable under the act to such contractor, his sub-contractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

These provisions as a rule are not held to apply to the owner of premises upon which improvements are being erected, demolished, altered or repaired by an independent contractor. Such contractor is deemed to be the employer of the employees of his subcontractors and their subcontractors unless the act specifically otherwise provides, as some of them do.³⁶

Some of the acts provide that if the owner of the premises fails to require his contractor to insure his compensation liability to the employees whom he employs on the premises, then the owner of the premises becomes jointly and severely liable therefore with his contractor.

It was so held in an Illinois case, where a corporation contracted with one to wreck a smokestack for \$140.00, and an employee of the contractor was killed in doing the work; the corporation not having required its contractor to insure his liability, was required to pay the compensation due.³⁷ But it was

35. *State Indus. Comm. v. Tassell & Fairbanks*, 184 N. Y. Supp. 426, 7 W. C. L. J. 104.

36. *Helton v. Tall Timber Lbr. Co. of La.*, — La. —, (1920), 86 So. 729, 7 W. C. L. J. 299.

37. *American Steel Foundries Co. v. Industrial Bd. et al.*, 284 Ill. 99, 119 N. E. 902, 2 W. C. L. J. 462.

held in the same state that a grocer was not liable for injuries to an employee of a contractor, who was building a foundation for the grocer's dwelling house. The contractor failed to take out insurance, but as the grocer was not "engaged in business of erecting or altering dwelling houses," he was not liable.³⁸

It has been held under the California Act that the commission has no authority to enter an award against a principal or the principal's insurance carrier, because of injuries to an employee of an independent contractor working on the principal's premises.³⁹ A similar decision was rendered in an Illinois case. Section 1, of the Illinois Act of 1913, providing that a principal shall be liable to the employee of a contractor when the contractor does not carry Workmen's Compensation insurance, does not apply to the owner of land, who enters into a contract with another to erect a building thereon, but applies in such case only as between the contractor and subcontractor.⁴⁰

The Minnesota Act contains the following typical provision "Any person who creates or carries into operation any fraudulent scheme, artifice or device to enable him to execute work without himself being responsible to the workmen for the provisions of this act, shall himself be included in the term 'employer,' and be subject to all the liabilities of employers under this act."

It has also been held under the Illinois act that a contractor is liable to an employee of a subcontractor if he enters into a fraudulent scheme to avoid liability for compensation.⁴¹

38. *Alabach v. Ind. Comm. et al.*, 291 Ill. 338, 126 N. E. 163, 5 W. C. L. J. 667.

39. *Western Indemnity Co. v. State Industrial Accident Comm.*, (1916), 172 Cal. 766, 158 Pac. 1033; *Sturdivant v. Pillsbury*, 172 Cal. 581, 158 Pac. 222; *Carstens v. Pillsbury*, 172 Cal. 572, 158 Pac. 218; *Packett v. Moretown Creamery Co.*, 91 Vt. —, 99 Atl. 638; *First Christian Church v. I. A. Comm.*, — Cal. —, 160 Pac 675.

40. *Littledair v. Crowley*, 1 Bull. Ill. Ind. Bd. 25.

41. *Parker Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976; *Butler St. Foundry & Iron Co. v. Ind. Bd.*, 277 Ill. 70, 115 N. E. 122.

It was held under the Connecticut Act that where the claimant, a carpenter, was working for a subcontractor on premises owned and controlled by the respondent, and doing work which was part of the respondent's business and it further appeared likely from the evidence that the contracts were mere subterfuges to escape liability, compensation should be awarded. The commissioner said: "Section 33, of the Compensation Act is intended to prevent subterfuges being successfully used to avoid the purpose of this statute and when taken in connection with Section 5, seems to me to make it my clear duty to render an award in favor of this claimant. If a series of sub-contracts of this character can be so made as to exempt everybody who has any responsibility from any liability where nine or ten people are employed, it would be very easy to make arrangements which would exempt everybody who had any responsibility where nine or ten hundred were employed, and thus the well-settled policy of the state adopted after mature consideration would be definitely set at naught."⁴²

Where an exhibitor secured floor space in an exhibition building and employed a contractor to erect and decorate a booth, directing to some extent the work of the contractor's employee, it was held that under the California Act, the exhibitor was liable as principal to an injured employee of the contractor.⁴³ So it has been held that the liability of a principal or general contractor, upon whose premises an employee of a contractor has been injured, is analogous to that of a surety, and he must pay any compensation, for which the immediate employer is liable, as in the case of an immediate employer who was a contract painter and employed a painter to help him paint the house of his principal. The painter was a casual employee as to both the contractor and principal, and employed in the regular trade or business of the contractor, but not of the principal. The commission held that the contractor or immediate employer being liable under the Compensation Act, for injuries sustained by the

42. *Mezansky v. Sissa*, 1 Conn. Comp. Dec. 431.

43. *Brain v. Eisnfelder*, 2 Cal. I. A. C. Dec. 30.

painter, the principal is also liable, though he would not have been liable if the painter had been employed directly by him.⁴⁴

In another case it was held that where a ship owner employed a contractor to clean the ship boilers, that the employees of the contractor were not employees of the ship owner, and that the work of boiler scaling on a ship is not work in the course of or for the purposes of his trade or business, within the meaning of the Compensation Act.⁴⁵

The above mentioned provisions do not, therefore, as a general rule apply to or change the law of independent contractor so as to bring contractors and subcontractors under the act unless it can be definitely shown that they are engaged in the usual business which their principal carries on, on or about the premises where the contractors and subcontractors are engaged in their work. So it has been held that it was not part of the employer's or principal's trade or business where a contractor employed workmen to do some tarring on the premises of chemical manufacturers;⁴⁶ or where manufacturers employed a deal porter by contract to pile timber on their premises, when the manufacturers never did such work themselves, it not being customary for persons in their trade to do it;⁴⁷ or owners of a barge, where they employed the mate;⁴⁸ or where a firm of drug grinders employed a contractor or ganger to unload a barge of sulphur and store it in their warehouse.⁴⁹

But in a Vermont case it was held that a teamster employed by one who has a contract with the manufacturer to haul lumber at a certain price per thousand feet, is entitled to obtain com-

44. *Neel v. White*, 2 Cal. I. A. C. Dec. 933; *Wallace v. Pratchner*, 2 Cal. I. A. C. Dec. 661.

45. *Spiers v. Elderslie Steamship Co.*, (1909), 46 Scotch L. R. 893, 2 B. W. C. C. 205.

46. *Zugg v. J. & J. Cunningham, Ltd.*, 1 B. W. C. C. 257, Ct. of Sess.

47. *Hockley v. West London Timber & Joinery Co.*, 7 B. W. C. C. 652 C. A.; *Packett v. Moretown Creamery Co.*, 91 Vt. —, 99 Atl. 638, 15 N. C. C. A. 501.

48. *Hayes v. S. J. Thompson & Co.*, 6 B. W. C. C., 130 C. A.; *Luckwill v. Auchin Steam Shipping Co., Ltd.*, 6 B. W. C. C. 51, C. A.

49. *Bobbey v. Crosbie* 8 B. W. C. C. 236 C. A.

pensation from the manufacturer of the lumber, for, the true test of employment is whether the work being done pertains to the business, trade, or occupation of the claimed employer carried on by it for pecuniary gain; and if so the fact that the work is being done through the medium of an independent contractor does not relieve the employer from liability.⁵⁰

§ 41. **On or About the Premises.**—It has been held that work is not done “on or about one’s premises,” within the meaning of the acts, where a workman on a new building was killed on a public road from 110 to 160 yards away from the building, while carting water to it;⁵¹ where a workman was injured while doing some work he had been sent to do on a ship at a dock about 550 yards from the factory of his employers;⁵² where a workman was killed at a place about two miles from the “engineering work” to which he was hauling sand from a pit;⁵³ where a workman hired by a subcontractor to cart rubbish was killed in the road two miles from the site of his work;⁵⁴ where a workman sustained an injury while stacking rails 700 yards from the “engineering” work of his employers;⁵⁵ where a miner was fatally injured at a point 400 yards from the mine pit, while transferring lumber from a railroad to the mine by means of a colliery cart;⁵⁶ where a driver met with an accident on the public road two miles from the factory from which he was hauling lumber to a building in the course of construction.⁵⁷

But it has been held that where a workman was carrying goods from a factory building to a point about 32 feet distant on the other side of the street and was there injured the injury occurred about the factory;⁵⁸ that where a workman was injured while

50. *Boyle v. Parker Young Co.*, —Vt. — 1921, 112 Atl. 385.

51. *Penn v. Miller*, 2 W. C. C. 55 C. A.

52. *Barclay, Carle & Co., Ltd., v. McKinnon*, 3 F. 436 Ct. of Sess.

53. *Pattison v. White & Co.*, 6 B. W. C. C. 61 C. A.

54. *Andrews v. Andrews & Mears*, 1 B. W. C. C. 264.

55. *Black v. Dick Kerr & Co., Ltd.*, 8 W. C. C. 40, H. L.

56. *Coylton Coal Co. v. Davidson*, 7 F. 727, Ct. of Sess.

57. *Whitton v. Bell & Sime, Ltd.*, 1F, 942, Ct. of Sess.

58. *McGovern v. Cooper & Co.*, 4 F. 249, Ct. of Sess.

engaged in loading a cart in the street near the entrance to his employer's premises he was about the premises.⁵⁹

§ 42. **Liability of Owner or Lessor to Employees of Lessee.**—Most of the acts either contain express provisions or imply liability for compensation on the part of the owner or lessor when the relation of lessor and lessee is created for the fraudulent purpose of avoiding liability.

It has been held that the lessee of a coal mine is an independent contractor although the lessor reserves the right to inspect the premises, and it is agreed that all the workings on the premises shall be done under the general supervision of the superintendent of the lessor.⁶⁰

Under the California Act a lessee is not a contractor of the lessor and the lessor is not liable for injuries to employees of the lessee or his subcontractors.⁶¹ So in the case of a corporation that owned an oil well which, in default of payment of a mortgage thereon, it turned over to the mortgagee as lessee to operate and collect the income to pay the mortgage, it was held that the corporation was not the employer of an injured workman employed by the mortgagee or lessee to look after the well.⁶²

In an Ohio case where a coal company, which had temporarily suspended operation of its mines, leased a portion of its lands to two former employees who employed their own help, it was held that the lessor company was not the employer of help employed by the lessees.⁶³ It has been held under the Wisconsin Act lessors and lessees do not sustain the relation of principal and contractor to each other, and that where an employee of the lessee

59. *Powell v. Brown*, 12 B. 157 C. A. 1 W. C. C. 44.

60. *Bokoshe Smokeless Coal Co. v. Morehead*, 126 Pac. 1033, 34 Okla. 424.

61. *Brain v. Eisnfelder*, 2 Cal. Ind. Acc. Com. 36, 11 N. C. C. A. 378; *Cypher v. United Development Co.*, 1 Cal. Ind. Acc. Com. (Part II) 425.

62. *Farris v. Patomac Oil Co.*, 2 Cal. Ind. Acc. Com. 462.

63. *In re Monroe*, 1 Bull. Ohio Ind. Com. 186; See also *Powers v. Hocking Valley Ry. Co.*, 31 Ohio Cir. Ct. 483.

is injured the lessor is not liable.⁶⁴ In a case under the Kansas Compensation Act an injured mine employee sought to hold liable both the lessor and the lessee of a mine as partners; it being shown that the lessor retained a certain supervisory control over the operations of the lessee. The court in holding the lessee liable as an independent contractor said: "Whatever may be the basis of the liability of the owner in certain caseswhether imputed agency, public necessity, or other ground, real or fictitious, this statute attaches no liability for compensation to one who is not in the execution, control or management of the work, wherein the injury occurs."⁶⁵

§ 43. Dual Employers, Employments, and Business Enterprises.—The subject of dual employers, employments, and business enterprises is as a rule not covered by specific provisions in the acts and the few decisions relating thereto are not entirely in accord.

A delivery man engaged by two employers to deliver packages, had delivered all the packages belonging to A, and was on his way to deliver a package belonging to B, when he was injured, and it was held that B alone was liable for compensation.⁶⁶ So a night watchman, who has contracts of hire with six independent concerns and acts as watchman for all of them, is an employee of each, and may recover from the one on whose premises he is injured.⁶⁷ But a night watchman employed to patrol the outside of the premises of several firms, watching for fires and other unusual occurrences, is employed jointly by all of said firms, and they are all liable for compensation under the California Act.⁶⁸ In New Jersey it has been held, that a watch-

64. *Puddy v. Ira R. Fitch*, Fourth Annual Report (1915), Wis. Ind. Comm. 17.

65. *Maughlille v. J. H. Price & Sons* 99 Kan. 412, 161 Pac. 907, (1916).

66. *Mitchell v. Alfred Stahel & Sons*, (1916), 3 Cal. Ind. Acc. Com. 303.

67. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491; But see *M. Johnston v. Mountain Commercial Co.*, 1 Cal. I. A. C. Dec. 100; *Mason v. Metal Supply Co.*, 1 Cal. I. A. C. Dec. 284.

68. *Frohn v. Bayle, La Coste & Co.*, 3 Cal. Ind. Acc. Com. 274.

man employed by several different persons to watch their premises is the joint employee of all such persons.⁶⁹

The fact that a policeman employed by a mining company, also happened to be a deputy sheriff and received fees from the county, did not relieve the company from liability.⁷⁰ A janitor in a public school, who also did work for other people, but was injured while at work for the school, was allowed to recover compensation from the municipal corporation employing him.⁷¹ The fact that one is employed in a dual capacity by the defendant and another does not make him any the less an employee of the defendant, and the dependents may elect which of the employers shall be proceeded against, under the California Act.⁷² A number of firms, individuals and corporations were compelled by law to repair a dam on a stream, the water power rights being owned by them jointly. By a decree of court three referees were appointed to carry out the work to be done. It was held that the referees were the agents of the various owners and that all were liable jointly for compensation by reason of the accidental death of a workman employed by the referees, and that the amount payable by each one of the employers was proportionate to the amount of his water right in the stream where the dam was to be built.⁷³

A partnership was engaged to do the glazing on a building, and as such the members were independent contractors. One of the partners looked after the delivery of the glass and was paid by the general contractor for this work. He was held to be the employee of the general contractor while performing this work.⁷⁴

Where a corporation conducted a retail store and a warehouse, in which a freight elevator was operated, and therefore came

69. *Curran v. Newark Gear Cutting Machine Co.*, 37 N. J. Law J. 21.

70. *James v. Witherbee, Sherman & Co.*, 2 N. Y. St. Dep. Rep. 483.

71. *Penfield v. Town of Glastonbury*, 1 Comm. Comp. Dec. 637.

72. *Johnston v. Mountain Commercial Co.*, 1 Cal. Ind. Acc. Com. 100.

73. *Sayres v. Ogdenbury Power & Light Co.*, 8 N. Y. St. Dep. Rep. 393.

74. *Dyer v. James Black Masonry & Contracting Co.*, 192 Mich. 400, 158 N. W. 959, 15 N. C. C. A. 499.

within the hazardous industry classification of the Illinois Act, but also conducted a farm near the city, it was held that one of its farm employees injured in the course of his employment by the kick of a horse, was not entitled to compensation under the Act, since the particular employment in which he was engaged at the time of the injury was not declared by the act to be extra hazardous.⁷⁵

The Illinois Commission has no authority to award compensation in the case of a city employee accidentally killed in a non hazardous employment even though the city may also be engaged in hazardous employments.⁷⁶

A repair shop operated by a department store company for the repair of vehicles in which machinery is used, power-driven machinery employed, and manual labor exercised, and over which the company has control or right of access, is an extrahazardous business, though merely incidental to the company's principal business, and a carpenter employed in such shop is engaged in extrahazardous employment within the provisions of the Washington Workmen's Compensation Act.⁷⁷

In a California case the commission found that the employee was injured by accident while in employment as a janitor of a dancing hall and house and garden laborer. His injury actually occurred while pruning a fig tree. The court on appeal said: "Ohlsson was thus employed for the performance of services in two capacities: One that of a janitor, falling within the terms of the act; the other as a house and garden laborer; employees engaged therein being excluded from its operation. Hence, if the injury sustained by Ohlsson was due to an accident while he was engaged in labor as and under his employment as a gardner, he would not be entitled to the benefits of the act, unless the service was incidental to the work of janitor. The pruning of this fig

75. *Vaughn's Seed Store v. Simonini*, 275 Ill. 477, 114 N. E. 163, 14 N. C. C. A. 1075.

76. *Marshall v. City of Pekin*, 276 Ill. 187, 114 N. E. 497, 14 N. C. C. A. 946.

77. *Wendt v. Industrial Ins. Commission of Washington*, 80 Wash. 111, 5 N. C. C. A. 790, 141 Pac. 311 (1914); *State v. Business Property Security Co.*, 87 Wash. 627, 152 Pac. 334, 11 N. C. C. A. 323.

tree without specific instructions so to do might well be regarded as within the scope of his employment as gardner, since the proper care thereof required such work to be done. It did not, however, interfere with the use of the driveway, and the pruning thereof had no connection with the work of janitor which by any stretch of the imagination could render it incidental thereto. Therefore the conclusion of law as found by the commission that at the time of the injury 'the applicant employee was not engaged in any of the occupations or employments excepted by section 14 of the Workmen's Compensation, Insurance and Safety Act from the provisions of the said act, is without support in the facts found. *Southern Pac. Co. v. Pillsbury*, 170 Cal. 782, 151 Pac. 277. The New York Compensation Act does not apply to all employees, but to those only engaged in certain occupations there designated as extrahazardous, while the California act applies to all except those designated as being excluded when engaged in certain work. This being true, the decisions of the New York courts in like cases furnish a rule which we think should be followed in the case at bar." The court then cited the case of *Gleisner v. Gross & Herbener*, 170 N. Y. App. Div. 37, 155 N. Y. Supp. 946 (1915), in which the court said: "Where the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute. If the employer shows that the employee was not so engaged when he met with injury, he is not entitled to reimbursement under the statute, even though he at times did work embraced within the statute." Also the case of *Sickles v. Ballston R. S. Co.*, 171 N. Y. App. Div. 108, 156 N. Y. Supp. 864, where the claimant was employed as purchasing and sales agent by the defendant engaged in the business of storing and handling fruits, claimant being injured while buying fruit. The court said: "The purchasing of goods and acquiring ownership thereto is not an incident to the business of conducting a storage house. The statute should be given a liberal interpretation, but liberality

should not be stretched into extravagance, and it seems to me that it would be highly unreasonable to hold that this claimant was injured in a hazardous employment as described and defined by the statute. It certainly was not the legislative intent, in using the word 'storage' and making it a hazardous employment, to include therein the duties of a purchasing agent." The court, therefore, held that the injury sustained by the employee in the instant case arose out of and in the course of his employment, not as a janitor, but while engaged in garden labor, which labor is included within the term horticultural labor, in doing which he was not entitled to the benefit of the act.⁷⁸

§ 44. Subrogation, and Third Persons as Affected by the Acts.—Most of the American Compensation Acts provide that the injured employee may proceed either against the third person whose negligence caused the injury or against his employer for compensation. But he cannot recover from both. As a rule they also provide that the employer who has paid or is paying compensation is subrogated to the rights of the injured employee against the negligent third person. As to the amount that may thus be recovered from the third person the acts and decisions differ.

The fact that compensation acts generally provide that the employer must pay his injured employee compensation even though a third person was alone at fault, does not make them unconstitutional.⁷⁹ Though it has been held that in so far as the California act attempts to authorize an award against a third person not an employer it is contrary to the California constitution.⁸⁰

78. *Kramer v. Industrial Acc. Comm. of California*, 31 Cal. App. 673, 161 Pac. 278 (1916). For additional cases on, see *Casual Employments*.

79. *Stertz v. Industrial Insurance Commission*, (1916), 91 Wash. 588, 158 Pac. 256; *Friebel v. Chicago City Ry. Co. et al.*, 280 Ill. 76, 117 N. E. 467, 16 N. C. C. A. 390; *Johnson v. Choate*, 284 Ill. 214, 119 N. E. 972; *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685; *Hugh Murphy Const. Co. v. Serck*, — Neb. —, (1920), 177 N. W. 747, 6 W. C. L. J. 194.

80. *Perry v. Indus. Acc. Comm.*, —Cal. —, 181 Pac. 788, 4 W. C. L. J. 350.

It has been held under the British Act that if a workman sues a third person at common law, and is defeated, he can ask the same court to assess compensation.⁸¹ In the case of a workman injured on the premises of a third person with whom he had an agreement to accept full wages and medical service, during incapacity, but not to exceed a period of six months, it was held that this was a recovery of damages which precluded the workman from claiming compensation from his employer, as the recovery of such damages need not necessarily be by legal proceedings.⁸² So where an employee is injured by reason of the negligence of a third person and accepts a settlement from such third person, he is under most acts, thereby barred from making a claim for compensation.⁸³ It has been held, in an action at law by a widow for a tort against a third party for damages for the death of her husband, in which she did not join or subrogate the employer, that this constituted an election of remedies, and after judgment in such action is rendered against her, she cannot thereafter claim compensation.⁸⁴ Where the father of an employee, who has been killed by reason of the negligence of a third party commenced an action at law against such third party for damages, an action for death benefit must be dismissed even though filed before the termination of the action at law.⁸⁵ But it has been held that the bringing of an action by an injured employee against the insurance carrier's physicians, for damages for malpractice in treating the injury does not bar the right of the employee to claim compensation.⁸⁶ Where an injured servant received an award of compensation and began suit against

81. *Potter v. John Welch & Son*, 7 B. W. C. C. 738.

82. *Page v. Burtwell*, 1 B. W. C. C. 267, L. R. A. 1916A, 361, note.

83. *Cook v. Employer's Liability Assurance Corp.*, 1 Mass. Ind. Acc. Bd. 50; *Labuff v. Worcester etc., Co.*, 231 Mass. 170 120 N. E. 381, 2 W. C. L. J. 903; *In re Cripp*, 216 Mass. 586, 104 N. E. 565.

84. *Moore v. Imperial Ice Co.*, 3 Cal. Ind. Acc. Comm., 353; But see *matter of Woodward v. E. W. Conklin & Son*, 171 App. Div. 736, 157 Supp. 948.

85. *Newman v. Sturgis Machine Works*, 3 Cal. Ind. App. Com. 256.

86. *McGrath v. Hydrox Chemical Co.*, 3 Cal. Ind. Acc. Com. 343; *Pawlack v. Hayes*, 162 Wis. 503, 156 N. W. 464, 11 N. C. C. A. 752.

his physician for malpractice, it was held that the assignment of his claim, for malpractice, to the employer did not necessarily carry with it or waive further claim to compensation.⁸⁷

The provision of the California Act for subrogation to the rights of an injured employee, will not be enforced in Oregon, because in Oregon a tort action is not assignable. Therefore a claim against the deceased's employer, a California corporation, deceased being a resident of that state, will not preclude the widow's recovery against the negligent third party in Oregon on the theory that the employer was subrogated to her rights, and the widow may sue the third party and recover full compensation.⁸⁸

It has been held that where the driver of a truck was injured by coming into collision with a street car, and died several days later, but before his death made a settlement with and gave a release to the street car company, this did not preclude the driver's widow from claiming compensation for his death from his employer, as the right of the dependents of the employee to compensation was independent of his rights to disability benefits before death;⁸⁹ that where the widow of a deceased workman sued a third person through whose negligence the workman is alleged to have been killed, this did not bar a claim of a dependent mother for compensation against the employer.⁹⁰ That an injured workman, who executed a release to a third party whose negligence caused the injury, is not estopped from claiming compensation from his employer because the latter did not consent to the release, and he is therefore not barred from asserting his

87. *Brown v. Fuller Co.*, 197 Mich. 1, 163 N. W. 492.

88. *Rorvik v. Northern Pac. Lbr. Co.*, — Ore. —, (1920), 190 Pac. 331, 6 W. C. L. J. 385; *Anderson v. Miller Scrap Iron Co. et al.*, — Wis. —, 182 N. W. 852.

89. *In re Cripp v. Aetna Life Ins. Co.*, 104 N. E. 565, 216 Mass. 586; *Williams v. Vauxhall Colliery Co.*, 2 K B. 433, 436; *Howell v. Bradford*, 104 L. T. R. N. S. 433; *Milwaukee Coke & Gas Co. v. Indus. Com.*, 160 Wis. 247, 151 N. W. 45.

90. *In re Cahill*, 173 App. Div. 418, 159 N. Y. Supp. 1060; *Mercer v. Ott*, 78 W. Va. 629, 89 S. E. 952; *Merril v. Marietta Torpedo Co.*, — W. Va. —, 92 S. E. 112, 14 N. C. C. A. 913. Contra, see *Gray v. North British Ry. Co.*, 8 B. W. C. C. 373.

claim against the third party;⁹¹ that where an injury is caused by the negligence of a third person, and the insurance carrier of the employer has paid compensation, the right of the employee as against the third person was subrogated to the insurance carrier of the employer, and the employee then has no right of action against the third person.⁹²

It is held in Indiana that the insurer has the right of subrogation, where the policy expressly gives it "only in the event it has paid the whole liability in any given case, and not an attempt to provide for subrogation pro tanto," citing *Knaffl v. Knoxville*, 133 Tenn. 655, 182 S. W. 232, Ann. Cas. 1917 C, 1181.⁹³

And where the state fund has paid compensation to the injured servant it is entitled to be subrogated pro tanto to the right of the servant in a judgment against a third person for damages.⁹⁴

It has been held that a settlement with a third person is a bar to compensation, although in making it the employee expressly reserves his right to compensation;⁹⁵ that where an employee is injured by reason of the acts of a third person and executes a release to the third person for consideration, this is a bar to a claim for compensation.⁹⁶

It has been held in New York that where an employee does not recover as much in a common-law action against a third per-

91. *Woodward v. E. W. Conklin & Son*, 171 App Div. 736, 157 Supp 948.

92. *Royal Indemnity Co. v. Platt & Washburn Refining Co.*, (1917), 98 Misc. 631, 163 N. Y. Supp. 197; *Louis Bossert & Sons v. Piel Bros.*, — N. Y. — (1920), 182 N. Y. S. 620, 6 W. C. L. J. 372; *Mayor and Council of Hagerstown v. Schreiner*, — Md. —, (1920), 109 Atl. 464, 5 W. C. L. J. 858; *Labuff v. Worcester Counsol. Ry's Co.*, 231 Mass. 170, 120 N. E. 381, 2 W. C. L. J. 903.

93. *Maryland Casualty Co. v. Cincinnati C. C. St. Louis Ry. Co.*, — Ind. App. —, 124 N. E. 774, 5 W. C. L. J. 69.

94. *Mayhugh v. Somerset Telephone Co.*, 265 Pa. 496 (1920), 109 Atl. 213, 5 W. C. L. J. 891.

95. *Mulligan v. Dick*, 41 Scot. L. R. 77; *Murray v. North British Ry. Co.*, 41 Scot. L. R. 383, L. R. A. 1916A, note 361.

96. *Gilliland v. Kearns*, 1 Conn. Comp. Dec. 277; *Silva v. Koperud*, 2 Cal. Ind. Acc. Com. 604; *Lantis v. City of Sacramento*, 2 Cal. Ind. Acc. Com. 663.

son as he would be awarded by way of compensation under the act, that is not such an election as discharges his employer and insurer.⁹⁷

Where an injured employee was taken to the hospital, used by the employer for that purpose, it was held that that did not constitute an election to take compensation under the act and thereby release the negligent third party, unless it could be clearly shown that the injured employee so intended.⁹⁸

§ 45. **Subrogation and Third Persons as Affected by the Acts.**—It has been held, and is frequently so provided in the acts, that where the employer or his insurer is liable and pays compensation to an injured employee the legislature may require the negligent third party, who caused the injury, to reimburse them for the amounts so expended.⁹⁹

A negligent third party, whose conduct has resulted in the accidental injury of the employee of another, profits materially by virtue of such provision, in that when the employee elects to claim compensation from his employer the third party is liable only for the amount of compensation paid by the employer, together with the expense of suit and attorney's fees, should suit be necessary to establish the third party's negligence.

It has been held under the Massachusetts Act that a dependent can proceed either against the employer or the third person whose negligence caused the death of the employee, but not

97. *Matter of Woodward v. E. W. Conklin & Son, Inc.*, 171 App. Div. 736, 157 Supp. 984.

98. *Wahlberg v. Bowen et al.*, 229 Mass. 335, 118 N. E. 645, 1 W. C. L. J. 790; *Horloff v. Merwin*, — Wis. —, (1920), 177 N. W. 913, 6 W. C. L. J. 416.

99. *Grand Rapids Lumber Co. v. Blair*, 190 Mich. 518, 157 N. W. 29, 16 N. C. C. A. 409; *Vereeke v. Grand Rapids*, 203 Mich. 85, 168 N. W. 1019, 2 W. C. L. J. 917; *Labuff v. Worcester Consol. St. Ry. Co.*, 231 Mass. 170, 120 N. E. 331, 2 W. C. L. J. 903; *Davis v. Cent. Vermont Ry. Co.*, — Vt. —, (1921), 113 Atl. 539; But see *Keerans v. Peoria etc. Traction Co.*, 277 Ill. 413, 113 N. E. 636, where it was held that the Act does not affect third persons in this respect, where they are not under it.

against both;¹ that where an employee accepts compensation he is precluded from bringing an action against a third person, whose negligence caused the injury, because the right to proceed against such third person is subrogated to the employer or his insurer;² that an insurer may prosecute an action in the name of the widow and administrator of a deceased employee for its own benefit;³ that an option to accept compensation under the Act instead of damages, exercised on behalf of an infant will be set aside, if it be not for the infant's benefit.⁴ But it has been held in New York that the widow may elect for a minor child, the election being binding.⁵

It has been held, under the Nebraska Act, that the fact that an employer was insured against loss occasioned by compensation to an injured workman, does not bar the employer's right to subrogation against a third person;⁶ that an employer might assign his right to the employee and enable the employee to sue the third party;⁷ that where a city paid compensation to its servant's widow for his wrongful death, as provided in the Wisconsin Act, her cause of action against the tortfeasor, who caused

1. *Barry v. Bay State St. Ry. Co.*, 220 Mass. 366, 110 N. E. 1031; *Woodcock v. London & Northwestern Ry.*, 6 B. W. C. C. 471; *Ma-homed v. Mounsell* 1 B. W. C. C. 269; *Labuff v. Worcester Consol. Ry. Co.*, 231 Mass. 170, 120 N. E. 381, 2 W. C. L. J. 903; *Anderson v. Miller Scrap Iron Co.*, —Wis.—, 182 N. W. 852.

2. *Hall v. Henry Thayer & Co.*, 225 Mass. 151, 113 N. E. 644; *Royal Indemnity Co., v. Platt etc. Refin. Co.*, 98 Misc. Rep. 631, 163 N. Y. Supp. 197; *Turnquist v. Hannon*, 219 Mass. 560, 107 N. E. 443, 14 N. C. C. A. 1015; *Muncaster v. Graham Ice Cream Co.*, — Neb. —, 172 N. W. 52; *Dallas Hotel Co. v. Fox*, — Tex. Civ. App. —, 196 S. W. 647; *Contra, Houlihan v. Sulzberger & Sons Co.*, 282 Ill. 76, 118 N. E. 429, 1 W. C. L. J. 536; *City of Austin v. Johnston*, — Tex. —, 204 S. W. 1181. 2 W. C. L. J. 845; *Merrill v. Marietta Torpedo Co.*, 79 W. Va. 669, 92 S. E. 112.

3. *Hall v. Thayer & Co.*, 225 Mass. 151, 113 N. E. 644.

4. *Ford v. Wren & Dunham*, 5 W. C. C. 48; *Stephens v. Dudbridge Iron Works Co.*, 6 W. C. C. 48.

5. *Hanke v. New York Consol. Ry. Co.*, 168 N. Y. S. 234, 16 N. C. C. A. 399.

6. *Otis Elevator Co. v. Miller*, 153 C. C. A. 302, 240 Fed. 376.

7. *Thomas v. Otis Elevator Co.*, 103 Nebr. 401, 172 N. W. 53, 4 W. C. L. J. 114.

his death, became the property of the city with which it might deal as it chose;⁸ that under the Texas Act, prior to 1917, the insurance carrier that had paid compensation, was not subrogated to the rights of employees against a third person, whose negligence alone caused the injury.⁹

But now the insurer's right to subrogation is established more in accord with the law in many other states, the insurance carrier or employer has the right of subrogation limited to the amount paid, and where the employee proceeds against the third party, the employer or insurance carrier should be made a party to the suit. The fact that the employee has received compensation does not bar the action against the third party.¹⁰ But in Iowa where the employee has first recovered from the third party and afterwards receives compensation from the employer, the employer has no right of action or subrogation against the third party.¹¹ Contra to the Iowa holding on the above point is the holding in Connecticut, New York, and California. In a Connecticut case an employee accepted a sum in excess of the amount allowed by compensation and released the third party before adjusting his compensation claim. It was held that the

8. *Saudek v. Milwaukee Elect R. etc. Co.*, 163 Wis. 109, 157 N. W. 579; *Marshall Jackson Co. v. Jeffery*, 167 Wis. 63, 166 N. W. 647, 1 W. C. L. J. 892.

9. *Austin v. Johnson*, — Civ. App. —, 204 S. W. 1181, 2 W. C. L. J. 845; *Aetna Life Ins. Co. v. Otis Elevator Co.*, — Tex. Civ. App. —, 204 S. W. 376, 2 W. C. L. J. 592; *Texas etc. R. Co. v. Archer* (Civ. App.) 203 S. W. 796, 2 W. C. L. J. 391.

10. *The Emilia De Perez*, 248 Fed. 480, 2 W. C. L. J. 11; *Lancaster v. Hunter*, — Tex. Civ. App. —, 217 S. W. 765, 5 W. C. L. J. 612; *Black v. Chicago Great Western R. Co.*, —Iowa—, 174 N. W. 774, 5 W. C. L. J. 218; *Wm. Cameron & Co. v. Gamble*, — Tex. Civ. App. —, 216 S. W. 459, 5 W. C. L. J. 312; *Fidelity & Casualty Co. v. Cedar Valley Electric Co.*, — Iowa —, 174 N. W. 709, 5 W. C. L. J. 228; *City of Shreveport v. Southwestern Gas & Electric Co.*, 145 La. 680, 82 So. 785, 4 W. C. L. J. 605; *Moreno v. Los Angeles Transfer Co.*, — Cal. —, 186 Pac. 800, 5 W. C. L. J. 489; *Stackpole v. Pacific Gas & Elect. Co.*, — Cal. —, 186 Pac. 354, 5 W. C. L. J. 461; *Western States Gas & Electric Co. v. Bayside Lumber Co.*, 187 Pac. 735, 5 W. C. L. J. 649.

11. *Southern Surety Co. v. Chicago, St. P. M. & O. Ry. Co.*, — Iowa —, 174 N. W. 329, 4 W. C. L. J. 710.

money so paid should be applied to the obligation of the employer to pay compensation.¹² And in New York, the law being that the claimant for compensation must assign his right against third parties, for the benefit of the state insurance fund, or the person or corporation liable for compensation, where a claimant was assaulted and the wrong doers were required under court decree to pay the claimant some money in order to suspend their sentence for assault, it was held that the employer was entitled to credit for the amounts so paid.¹³

Where the dependent mother elected to receive compensation and the employer never prosecuted its right to subrogation against the third party, the employer cannot have the compensation claim reduced by the amount received by the mother from the administrator of the deceased's estate, the administrator having recovered from the third party under the Survival Act for negligent killing. Had the employer prosecuted his claim against the third party and recovered, the amount so recovered would then have been considered in the administrator's action against the third party.¹⁴

It has been held in Michigan that the personal representative of a deceased employee, by making settlement with the negligent third party, does not thereby release the deceased's employer from liability to pay compensation, nor affect the right of the employer to proceed against such third party which he may do as if no settlement had been made.¹⁵

The wording of the California Act vests the right of subrogation in the employer and consequently the holding in California is contrary to the Iowa case last above mentioned. The court said in a recent case: "The interest of the employer in the cause of action which the injured employer has against the third party, whose negligent act caused the injury, is in the nature of a lien

12. *Rosenbaum v. Hartford News Co.*, 92 Conn. 398, 103 Atl. 120, 1 W. C. L. J. 930.

13. *Dietz v. Solomonwitz*, 179 App. Div. 560, 166 N. Y. S. 849, 16 N. C. C. A. 414.

14. *Vereeke v. City of Grand Rapids*, 203 Mich. 85, 168 N. W. 1019, 2 W. C. L. J. 917.

15. *Naert v. Western Union Tel. Co.*, — Mich. —, 172 N. W. 606.

thereon which he can enforce by action in his own name and which right cannot be impaired or destroyed by any act of the injured employee not concurred in by the employer.¹⁶

In California an insurance carrier and the injured employee may join in an action against the negligent third party, without an award of compensation having been made, because liability to pay compensation is created by the act, and not by the award.¹⁷

Under the Kentucky Act an employee injured by the negligence of a third party may, after receiving compensation from the employer, join his employer in a suit to recover against the negligent third party, his employer being entitled to receive the amount of compensation paid to the employee from the amount recovered from the third party.¹⁸

Under the Michigan Act, providing for recovery by the employer or insurer from a third party tort-feasor, payment of compensation either by agreement or by order of the Industrial Accident Board, is prima facie evidence of the tort-feasor's liability.¹⁹ It has been held that where a city paid a foreman full wages while disabled through the negligence of a third person, this did not operate as an assignment of his right of action to the city under the Wisconsin Act, because a foreman is not covered by it;²⁰ that the negligent third party cannot be sued by the employer's insurance company when he has already been sued by the employee's widow for the same act;²¹ that an employee's assignment of his cause of action, against a third party vested title thereto in the employer who could not be divested thereof, against his consent, by either the employee or

16. *Papineau v. Ind. Acc. Comm.*, — Cal. —, 187 Pac. 108, 5 W. C. L. J. 492; *Mass. Bonding & Ins. Co. v. San Francisco-Oakland Terminal Ry.*, 39 Cal. App. 388, 178 Pac. 974, 3 W. C. L. J. 574.

17. *Moreno v. Los Angeles Transfer Co.*, — Cal. App. —, 186 Pac. 800.

18. *Book v. City of Henderson*, — Ky. App. —, 197 S. W. 499, A 1 W. C. L. J. 678.

19. *Grand Rapids Lumber Co. v. Blair*, 190 Mich. 518, 157 N. W. 29; But see *Brabon v. Gladwin Light etc. Co.*, 201 Mich. 697, 167 N. W. 1024, 2 W. C. L. J. 302.

20. *Hornburg v. Morris*, 163 Wis. 31, 157 N. W. 556.

21. *Dettliff v. Hammond, etc. Co.*, 195 Mich. 117, 161 N. W. 949.

the commission;²² that where the dependents elected to claim under the act, and the cause of action against the third person was assigned to the insurance carrier of the employer, the carrier could maintain the action against the third person;²³ that the question of the third parties negligence was for the jury to decide;²⁴ that though the employer's negligence concurred with that of a third person that does not bar the employer's right to subrogation against such third person;²⁵ that under the Michigan Act, an employer, having made a payment to an injured employee, may recover against a third person guilty of negligence regardless of whether the payment is in full or only partial;²⁶ than an employee, by accepting compensation under the New York Act, subrogates to his employer any cause of action he might have against a third person for negligently causing the employee's injury,²⁷ and the employer or his insurer who is compelled to pay compensation to an employee injured by reason of the negligence of a third person is not limited in the recovery against the third person to the actual compensation liability or payment,²⁸ though any excess recovery

22. *Sabatino v. Crimmins Const. Co.*, 102 Misc. Rep. 172, 168 N. Y. S. 495, 1 W. C. L. J. 709.

23. *Traveler's Ins. Co. v. Padula Co.*, 224 N. Y. 397, 121 N. E. 348, 3 W. C. L. J. 339.

24. *Royal Indemnity Co. v. Platt etc. Refin. Co.*, 98 Misc. Rep. 631, 163 N. Y. S. 197.

25. *Otis Elevator Co. v. Miller*, 153 C. C. A. 302, 240 Fed. 376. Held otherwise where the employer's other employees as well as the negligence of the third person contributed to the injury. *Cory v. France F. & Co.*, 1 K. B. 114 (Eng.) L. R. A. 1916A (note) 362.

26. *Albrecht v. Whitehead etc. Iron Works*, 200 Mich. 108, 166 N. W. 855, 1 W. C. L. J. 1013; Also N. Y. see *Casualty Co. of America v. A. C. Sweet Elect. Light & Power Co.*, 174 N. Y. App. Div. 825, 162 N. Y. S. 107; *Henderson T. & T. Co. v. Owensboro H. T. & J. Co.*, — Ky. —, 233 S. W. 743.

27. *Miller v. New York Railway Co.*, 171 App. Div. 316, 157 Supp. 200; *Royal Indemnity Co. v. Platt etc. Refin. Co.*, 98 Misc. Rep. 631, 163 N. Y. S. 197; *United States Fidelity & Guaranty Co. v. New York Rys. Co.*, 93 N. Y. Misc. 118, 156 N. Y. S. 615, 14 N. C. C. A. 1018.

28. *Casualty Co. v. Swett Elect Co.*, 174 App. Div. 825, 162 N. Y. S. 107; *Otis Elevator Co. v. Miller (Nebr.)* 153 C. C. A. 302, 240 Fed. 376; See also *U. S. Fidelity & Guaranty Co. v. N. Y. Railways Co.*, 156 N. Y. S. 615, 93 Misc. Rep. 118.

should be paid to the injured employee.²⁹ Where the employee in an action against the negligent third party, recovers an amount greater than that allowed under the compensation act, the employer has no right of action against such third party.³⁰

In Illinois, when the third party is not under the act, the employer or employee may bring the action against the third party. The employer being subrogated to the amount he had paid or is bound to pay, and all in excess recovered is paid to the employee. Where the employee brings the action he may prosecute the claim for compensation at the same time.³¹ But where the third party is also under the act and the injury arose out of and in the course of the employment, the employee is limited to his compensation, and the employer is subrogated to the right of the employee, the recovery being limited to the amount payable under the act.³²

Where the third party is under the act but the injury did not arise in the course of the employment, an action will lie and the amount of recovery is not limited to the compensation rate.³³ In Minnesota the employer's right of recovery against the third party, where he has been subrogated by the employee's election to accept compensation, depends upon whether the proximate cause of the injury was the negligent act of the third party.³⁴ In Minnesota the employer is subrogated to the

29. *Western Gas & Elect. Co. v. Bayside Lbr. Co.*, — Cal. —, (1920), 187 Pac. 735, 5 W. C. L. J. 649; *Stockpole v. Pac. Gas. & Elect. Co.*, — Cal. —, 186 Pac. 354; See S. Dak. Act, 1921, Amendment, § 9446.

30. *Louis Bossert & Sons v. Piel Bros.*, — N. Y. —, (1920), 182 N. Y. S. 620; 6 W. C. L. J. 372.

31. *Houlihan v. Sulzberger*, 282 Ill. 76, 118 N. E. 429, 1 W. C. L. J. 536; *Gones v. Fisher*, 286 Ill. 606, 122 N. E. 95, 3 W. C. L. J. 596.

32. *Friebel v. Chicago City Ry. Co.*, 280 Ill. 76, 117 N. E. 467, 1 W. C. L. J. 18; *Keeran v. Peoria, Bloomington, Champaign, Traction Co.*, 277 Ill. 413, 115 N. E. 636, 16 N. C. C. A. 406; *Mahowald v. Thompson Starrett*, 134 Minn. 113, 158 N. W. 913, 14 N. C. C. A. 904; *Vose v. Central Illinois Pub. Serv. Co.*, 286 Ill. 519.

33. *Hade v. Simmons*, 132 Minn. 344, 157 N. W. 507, 14 N. C. C. A. 907; *Otto v. Duluth St. Ry. Co.*, 138 Minn. 312, 164 N. W. 1020, 16 N. C. C. A. 402; *Podgorski v. Kerwin*, 144 Minn. 313, 175 N. W. 694, 5 W. C. L. J. 544.

34. *Carlson v. Minneapolis St. Ry. Co.*, 143 Minn. 129, 173 N. W. 405, 4 W. C. L. J. 513.

rights of the employee against the third party to the extent of the compensation paid by the employer.³⁵

Where the third party exercises control over the actions of the injured employee it brings him under the provisions of the act, and the right to sue the third party at common law is lost, and the employee may look to his employer, the third party or both for compensation under the Acts.³⁶

It has been held that an employee who is injured while in the service of a corporation cannot sue its president for common law damages, as his only remedy is his claim for compensation under the statute,³⁷ but that an injured employee entitled to compensation might sue his employer's foreman, as a 'third person' whose negligence caused the injury;³⁸ that a negligent third person, who has accepted the Compensation Act, is nevertheless subject to a suit at common law for damages by the employee of another who was liable for compensation, had the employee elected to accept compensation.³⁹

What constitutes an election to accept compensation where the employees or his dependents have a right of action against third parties is a question of fact. It has been held that the fact that a widow accepted some compensation from the employer of her deceased husband, not having made a claim or having any agreement approved by the Board, does not constitute an election, and an action against the third party was not barred.⁴⁰ In a somewhat similar case the employer and employee made an agreement that the money paid as compensation should be returned in the event of a recovery against the third person. It was held that the action

35. *Hansen v. Northwestern Fuel Co.*, — Minn. —, 174 N. W. 726.

36. *Lee v. Cranford Co.*, 182 App. Div. 191, 169, N. Y. S. 370, 1 W. C. L. J. 854.

37. *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, 4 N. C. C. A. 786; *Winter v. Peter Doelger Brewing Co.*, 175 App. Div. 796, 162 N. Y. S. 469, 14 N. C. C. A. 909; *Northern Pacific Ry. Co. v. Meese*, 239 U. S. 614, 10 N. C. A. 939, 60 L. Ed. 467.

38. *Churchill v. Stephens*, 91 N. J. L. 195, 102 Atl. 657, 1 W. C. L. J. 651.

39. *Smale v. Wrought Washer Co.*, 160 Wis. 331, 151 N. W. 803.

40. *Brabon v. Gladwin Light & Power Co.*, 201 Mich. 697, 167 N. W. 1024; 2 W. C. L. J. 302, 16 N. C. C. A. 392.

against the third party was not precluded by the receipt of compensation, as the employee was bound to return it in the event of a recovery, and hence would be held to have recovered against only one of the parties.⁴¹

Where the widow of a deceased employee entered into an agreement with the employer whereby she was to proceed against the third party, and the agreement provided that in the event the recovery against the third party was not equal in amount to the sum she was entitled to under the compensation law the insurance carrier of the employer would pay such difference, and it was further agreed that should the carrier be financially unable to meet the claim the employer would be held harmless, the court held that such an agreement was not binding and so did not constitute an election to accept compensation and the action against the third party was not therefore barred.⁴²

It has been held that where the employer's right to sue the third person was established, the employer could assign it to another who could bring the action;⁴³ that third person may set up as a defense the fact that the injured employee has been paid compensation as provided under the Act;⁴⁴ that the employee's failure to pay his hospital bill for the first two weeks, when not requested so to do, does not constitute an election to accept compensation and release the third person.⁴⁵

Under the Kansas Act a claimant may maintain a proceeding for compensation against the employer and also an action against the third party, but can recover against only one. As stated by the court: "The statute thus gives a sort of dual cause of action, for compensation and for damages, but qualifies and limits the recovery to the one or the other. The plaintiff has not accepted

41. *Mingo v. Rhode Island Co.*, 41 R. I. 423, 103 Atl. 965, 2 W. C. L. J. 562.

42. *Dettloff v. Hammond, Standish & Co.*, 195 Mich. 117, 161 N. W. 949, 14 N. C. C. A. 901.

43. *McGarvey v. Independent Oil & Grease Co.*, 156 Wis. 580, 146 N. W. 895, 5 N. C. C. A. 803; *Frankfort Gen. Ins. Co. v. City of Milwaukee*, 164 Wis. 77, 159 N. W. 581, 14 N. C. C. A. 1014; *Saudek v. Milwaukee Elec. Ry. & Light Co.* 163 Wis. 109, 157 N. W. 579, 14 N. C. C. A. 1021.

44. *Miller v. N. Y. Railways Co.*, 157 N. Y. S. 200 171 App. Div. 316.

45. *Wahlberg v. Bowen* (Mass.), 118 N. E. 645, 1 W. C. L. J. 792.

the compensation provided for her and her children under the arbitration proceedings, and she has done nothing to estop herself from exercising her dual action conferred by the statute. The time will probably come in the course of the present lawsuit when plaintiff must elect whether she will accept the compensation provided for her or accept the damages which she may recover against Hoffman, provided she successfully maintains her cause of action against him, but there is nothing in the statute which says or infers that she need choose between the damages and the compensation until she knows definitely which is the more to her advantage. In this respect the Kansas statute differs from some other state laws. English and Scotch decisions are cited by defendants, but upon careful examination we discern nothing therein which detracts from the views herein expressed. See, also, *Columbia Law Review*, June 1918, vol. 18, No. 6, p. 598." ⁴⁶

But under the Washington Act an employee has only his right of action against the employer and cannot maintain an action against the third party causing the injury unless the injury caused by the third party was incurred "away from the plant of the employer." ⁴⁷

The claim of the employee against a negligent third party on account of personal injuries has been held to be assignable to one who is a stranger to the entire matter. ⁴⁸ Assignment by the injured employee to his employer of so much of his claim against the third party as will indemnify the employer for compensation paid, does not bar the employee's right of action against such third party. ⁴⁹

A widow may not assign her right of action for the death of her husband under the Oregon Employers' Liability Act. But

46. *Swader v. Kansas Flour Mills Co.*, 103 Kan. 378, 176 Pac. 143, 3 W. C. L. J. 129.

47. *Zenor v. Spokane & I. E. R. Co.*, 109 Wash. —, 186 Pac. 849, 5 W. C. L. J. 634; *Madden v. Northern Pac. Ry. Co.*, 242 Fed. 981, 16 N. C. C. A. 407. See *Utah Act*, 1921 Amendment, § 3133.

48. *Shreveport v. Southwestern Gas & Elec. Co.*, 140 La. —, 74, So. 559; *Phoenix Const. Co. v. Witt & Saunders*, — Tex. Civ. App. —, 190 S. W. 780.

49. *Lancaster v. Hunter*, —Tex., Civ. App.—, 217 S. W. 765.

where she accepts compensation from the employer, her right against a third party passes to the employer and any excess recovered by him under such right against a third party must be held for the benefit of the widow as the right of action is indivisible and belongs to two persons, and in case the employer refuses to join as a plaintiff he may be made a defendant.⁵⁰

The bringing of an action by the widow of the deceased, his administratrix, against the negligent third party to recover damages under How. Ann. St. Mich. 1912, Par. 13702-3, was held not to amount to a waiver of her right to claim compensation from the employer under the workmen's compensation act, despite St. 1919, Par. 2394-25, Subd. 2.⁵¹

Mere negotiations with a third party does not constitute a claim precluding the injured party from claiming compensation from the employer, since a claim under the statute means a demand of some matter of right made by one person upon another to do or to forbear to do some act or thing as a matter of duty.⁵²

It has been held in Michigan that where an employee may proceed against either his employer or a third person and he files suit against the third person and later petitions for compensation, the action at law will abate.⁵³

Under the Federal Act, where an employee proceeds against a third party and recovers, the commission is entitled to have the amount recovered, less court costs and reasonable attorneys fees, credited against the award under the act; and the employee may recover the difference from the commission.⁵⁴

Where a suit against a third party would be futile, compensation will be allowed under the Federal Act.⁵⁵

50. *Rorvik v. N. Pac. Lbr. Co.*, 195 Pac. 163, — Ore. —, (1921).

51. *Miller Scrap Iron Co. v. Indus. Comm.*, — Wis. —, 130 N. W. 826.

52. *Town of Stephenson v. Indus. Comm.*, — Wis. —, (1921), 180 N. W. 842.

53. *Barbon v. Gladwin Light & Power Co.*—Mich.—, 167 N. W. 1024, 2 W. C. L. J. 302.

54. *In re Wm. E. Davis*, 2nd A. R. U. S. C. C. 234; *In re Fay F. Leslie*, 2nd A. R. U. S. C. C. 235; *In re Solomon Schubert*, 2nd A. R. U. S. C. C. 235; *In re Chas. W. Poinsett*, 2nd A. R. U. S. C. C. 235.

55. *In re Wm. E. Davis*, 2nd A. R. U. S. C. C. 236; *In re L. B. Ashton*,

Where the vice president of a corporation causes injury to an employee of the corporation such vice president is a "person other than the employer" within the compensation act and therefore the employee is entitled to elect against whom he shall proceed.⁵⁶

It is held under the Federal Act that where the recovery against a third party is more than the amount due from the commission, the excess will be credited to the commission in lieu of any future claim which may be made for other injuries to the claimant.⁵⁷

Damages to claimant's watch collected from a third party was held to be a proper credit against the amount due from the Federal Commission.⁵⁸

Under the Louisiana Act the employer is subrogated to all rights, of the employee against a third party causing the injury, and a claimed right of subrogation to the injured employee by the third party upon payment of the claim to the employee will not avail the third party anything.⁵⁹

A third party causing injury to an employee cannot affect the employer's right of subrogation to the extent of the compensation awarded, by settling with the employee without the employer's consent.⁶⁰

§ 46. Cases Exclusively Covered by Federal Law.—Cases exclusively covered by any federal law, are as a rule expressly or impliedly excluded from the operation of the compensation acts by special provisions of the acts. While such cases would be ex-

2nd A. R. U. S. C. C. 237; *In re Jeremiah S. Irish*, 2nd A. R. U. S. C. C. 237.

56. *Webster v. Stewart*,—Mich.—, (1920), 177 N. W. 230, 6 W. C. L. J. 63.

57. *In re James M. Ferreebee*, 2nd A. R. U. S. C. C. 238.

58. *In re Geo. Holman*. 2nd A. R. U. S. C. C. 239.

59. *McClintic Marshall Co. v. O'leary*, — La. —, (1920). 84 So. 503, 6 W. C. L. J. 179.

60. *Hugh Murphy Const. Co. v. Serck*, — Neb. —, (1920), 177 N. W. 747, 6 W. C. L. J. 194.

Note. see Sections 466 and 467.

cluded regardless of such provisions, it nevertheless becomes a matter of importance to determine what cases, otherwise within the provisions of the acts are exclusively covered by federal law.

On May 17, 1917, the Supreme Court of the United States handed down a decision to the effect that the State Compensation Acts do not apply in any event to interstate employees on railroads, as the Federal Employers' Liability Act of 1908 as amended in 1910 (Section 8657-8665 United States Compiled Statutes 1916, page 9338), affords the exclusive remedy in such cases.⁶¹ The following quotation from the opinion in that case is pertinent and throws much light on this subject concerning which there has been considerable controversy. "It is settled that under the commerce clause of the Constitution, Congress

61. N. Y. Cent. R. R. Co. v. Winfield, 244 U. S. 147, 37 Supp. 546, 61 L. Ed. 1045 Ann. Cas. 1917D, 1139; rev'g Winfield v. N. Y. Cen. R. R. Co., 216 N. Y. 284, 110 N. E. 614, 10 N. C. C. A. 916; Winfield v. Erie R. R. Co., 88 N. J. Law 619, 96 Atl. 394, 37 Sup. Ct. Rep. 556, A 1 W. C. L. J. 41, and affirming the doctrine of Smith v. Ind. Acc. Com. of Cal., 26 Cal. App. 560, 147 Pac. 600; Staley v. Ill. Cen. R. R. Co., 268 Ill. 356, 109 N. E. 342; Matney v. Bush, 102 Kan. 293, 169 Pac. 1150, 1 W. C. L. J. 617; Walker v. Chicago etc. R. R. Co., (Ind. App) 117 N. E. 969, 1 W. C. L. J. 362; See also, Rounsaville v. Cen. Railroad, 90 N. J. Law 176, 101 Atl. 182, reversing judgment 87 N. J. L. 371, 94 Atl. 392; McKenna v. N. Y. Cent. R. Co., 202 Mich. 103, 167 N. W. 900, 2 W. C. L. J. 300; Miller v. Grand Trunk Western R. Co., 201 Mich. 72, 166 N. W. 833, 1 W. C. L. J. 1021; Crecllius v. Chic. etc. R. Co., (Mo.) 205 S. W. 181, 2 W. C. L. J. 809; The Erie Lighter (D. C.) 250 Fed. 490, 2 W. C. L. J. 606; Erie R. Co. v. Downs, (C. C. A.), 250 Fed. 415, 2 W. C. L. J. 599; Ill. Cent. R. Co. v. Ind. Bd., 284 Ill. 2667, 119 N. E. 920, 2 W. C. L. J. 444; See Brinsko's Estate v. Lehigh Valley R. Co., 90 N. J. L. 658, 102 Atl. 390, 1 W. C. L. J. 431. For a complete discussion of all cases on this subject prior to the above decision of the Supreme Court see L. R. A. 1916A, (note), 461; also 9 N. C. C. A. note 286-307, 6 N. C. C. A. (note) 920-933, 10 N. C. C. A. (note) 916-925; Kinsellaco v. N. Y. Cent. R. Co., 175 N. Y. S. 363, 186 A. D. 856, 4 W. C. L. J. 134; Reilly v. Erie Ry. Co., 264 Penn. 329, 107 Atl. 736, 4 W. C. L. J. 639; N. Y. Cent. R. R. Co. v. Porter, 249 U. S. 168; Phil. & R. Ry. Co. v. Hancock, 40 Sup. Ct. 512, 6 W. C. L. J. 247; Williams v. Schaff, — Mo. —, (1920), 222 S. W. 412, 6 W. C. L. J. 346; Wangerbro v. Indus. Bd., — Ill. —, 121 N. E. 724, 3 W. C. L. J. 439; Erie R. Co. v. Krysienski, 238 Fed. 142, A 1 W. C. L. J. 59; Tandrum v. Western A. R. Co., — Ga. —, 90 S. E. 710, A 1 W. C. L. J. 298; Savon v. Erie Ry. Co., — N. Y. App. —, 116 N. E. 983, B 1 W. C. L. J. 205.

may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all State laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. Congress acted upon the subject in passing the Employer's Liability Act, and the extent to which that act covers the field is the point in controversy. By one side it is said that the act, although regulating the liability or obligation of the carrier and the right of the employee where the injury results in whole or in part from negligence attributable to the carrier, does not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by State laws; and by the other side it is said that the Act covers both classes of injuries and is exclusive as to both. The State decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in *Winfield v. Erie R. R. Co.*, 88 N. J. Law 619, hold that the Act relates only to injuries resulting from negligence, while the California court in *Smith v. Industrial Accident Commission*, 26 Cal. App. 560, and the Illinois court in *Staley v. Illinois Central R. R. Co.*, 268 Ill. 356, hold that it has a broader scope and makes negligence a test—not of the applicability of the Act, but of the carrier's duty or obligation to respond pecuniarily for the injury. In our opinion the latter view is right and the other wrong. * * * The Act is entitled, 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' and the suggestion is made that the words 'in certain cases' require the Act be restrictively construed. But we think these words are intended to do no more than to bring the title into reasonable accord with the body of the Act, which discloses in exact terms that it is not to embrace all cases of injury to the employees of such carriers, but only such as occur while the carrier is engaging and the employee is employed in 'commerce between any of the several States,' etc. See *Employers' Liability Cases*, 207 U. S. 463.

"Only by disturbing the uniformity which the Act is designed to secure and by departing from the principle which it is intended

to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the Act, for, as is said in *Prigg v. Pennsylvania*, 16 Pet. 539, 617, 'if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it.' Thus the Act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carrier's duty or obligation as to both. And the reasons which operate to prevent the states from dispensing with compensation where the Act requires it equally prevent them from requiring compensation where the Act withholds or excludes it."

It has been held that where a street car company is both an intrastate and an interstate carrier an employee injured while operating a car confined to intrastate traffic is not covered by the Federal Employers Liability Act.⁶² This act refers to interstate commerce, and if the employee at the time of the injury is engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof, then he must resort to his remedy, if any, under this act, and is not entitled to benefits under the State Workmen's Compensation Act.⁶³ Construction work was

62. *Watts v. Ohio Valley Elec. Ry. Co.*, 78 W. Va. 144, 88 S. E. 659.

63. *Ill. Cent. R. Co. v. Ind. Bd.* 284 Ill. 267, 119 N. E. 920, 2 W. C. L. J. 444; *Vollmers v. N. Y. Cent. R. Co.*, 180 App. Div. 60, 167 N. Y. S. 426, 1

held not to be so closely related to interstate transportation as to be a part of it.⁶⁴

The test as to whether an employee was engaged in interstate commerce at the time of the injury is whether the performance of the act he was engaged in directly and immediately tended to facilitate the movement of interstate commerce. Therefore, where an employee was unloading concrete tile, which had been shipped from another state, after it arrived at its destination and was injured when leaving the place on a gasoline car, he was not engaged in interstate commerce.⁶⁵

But where an employee was injured when unloading ties from a car being hauled on a main line between Omaha and Chicago, which ties were to be used to replace old ties, he was engaged in interstate commerce.⁶⁶

The fact that an employee engaged in interstate commerce files a claim for compensation under the State Workmen's Compensation Act does not deprive him of his right of action under the Federal Employer's Liability Act,⁶⁷ nor does the fact that the

W. C. L. J. 253, *Chicago, etc. R. Co. v. Harrington*, 241 U. S. 178, 36 Sup. Ct. 517, 50 L. Ed. 941; *Shanks v. Delaware, etc. R. Co.*, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; *Eskelson v. Union Pac. R. Co.*, 102 Neb. 423, 168 N. W. 366, 2 W. C. L. J. 665; N. Y. Cent. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. Rep. 247 L. R. A. Ann. Cas. 1917D, 629; *Southern Pac. Co. v. Ind. Acc. Comm. of Cal.*, 40 Supp. Ct. 930, 5 W. C. L. J. 341; *Bergeron v. Texas & Pac. R. Co.*, 144 La. 225, 80 So. 262, 3 W. C. L. J. 305; *Guida v. Penn. R. R. Co.*, 183 App. Div. 822, 2 W. C. L. J. 679.

64. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 152, 57 L. Ed. 1125 Ann. Cas. 1914C, 153, *Chic. C. B. & Q. R. Co. v. Harrington*. 241 U. S. 178, 36 Sup. Ct. 517, 60 L. Ed. 941.

65. *Morrison v. Chicago M. & St. P. Ry.* — Wash. —, 175, Pac. 325, 3 W. C. L. J. 81; *Hudson & M. R. Co. v. Iorio* (N. Y.) 239 Fed. 855, A 1 W. C. L. J. 57; *Christy v. Wabash Ry. Co., Mo.*, 191 S. W. 241; *Giovio v. N. Y. Cent. R. R. Co.*, 162 N. Y. 1026, B 1 W. C. L. J. 1226.

66. *Reed v. Dickinson*, (Iowa), 169 N. W. 673; *Gulf C. & S. F. Ry. Co. v. Drennan*, 204 S. W. 691, — Tex. Civ. App. —, 2 W. C. L. J. 701, 241 U. S. 177, 180; 11 N. C. C. A. 992; *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U. S. 43, 147 C. C. A. 245, 233 Fed. 239; *Delaware, L. & W. R. Co. v. Yurkonis* 238 U. S. 439.

67. *Troxell v. Del. L. & W. R. R. Co.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586; *Waters v. Guile*, 148 C. C. A. 298, 234 Fed. 532; nor con-

defendant railroad company paid part of the injured servant's hospital bill, show an acceptance of the Michigan Workmen's Compensation Act so as to exclude suit under the Federal Employer's liability Act.⁶⁸

It has been held that where the employing railroad is engaged in both interstate and intrastate commerce, to relieve itself of the obligation to pay compensation under the Illinois Compensation Act, (Hurd's Rev. St. 1917, c. 48, Secs. 126-152) it had the burden of showing that at the time of the injury the servant was actually engaged in interstate commerce;⁶⁹ that in a proceeding to recover compensation the burden was on the petitioner to show affirmatively that decedent was engaged in intrastate service not regulated by the Federal Employer's Liability Act;⁷⁰ that the Industrial Accident Board has no jurisdiction of a servant's claim for compensation under the Compensation Act for injury, where the servant was employed upon a car ferry in interstate commerce when the accident occurred;⁷¹ that a timekeeper of a gang of workmen repairing a track used in interstate commerce, who was killed while crossing the tracks on his way to telegraph a report to the roadmaster was engaged in interstate commerce at the time of the accident, although it occurred after the men had ceased work;⁷² that employees engaged in constructing telegraph lines were not engaged in interstate commerce, although the company

versely. *Jackson v. Ind. Bd. of Ill.* See 117 N. E. 705, 1 W. C. L. J. 160.

68. *Grand Trunk R. Co. v. Knapp*, 147, C. C. A. 624, 233 Fed. 950.

69. *Ill. Cent. R. Co. v. Ind. Bd.*, 284 Ill. 267, 119 N. E. 920, 2 W. C. L. J. 444, N. Y. C. & H. R. R. Co., v. Carr 238 U. S. 260; *Shanks v. Delaware L. & W. R.*, 239 U. S. 556, L. R. A. 1916C, 797; *Westmans Case*, 106 Atl. 532, 4 W. C. L. J. 213, (1910); *Atchison T. & S. F. Ry. Co. v. Industrial Commission*. — Ill. —, 125 N. E. 380, 5 W. C. L. J. 364.

70. *Lincks v. Erie R. Co.* 91 N. J. Law 166, 103 Atl. 176, 1 W. C. L. J. 1096.

71. *Thornton v. Grand Trunk-Milwaukee Car Ferry Co.*, 202 Mich. 609, 166 N. W. 833, 1 W. C. L. J. 1019. See also *Miller v. Grand Trunk etc. R. Co.*, 201 Mich. 72, 166 N. W. 833; *Carey v. Grand Trunk Western R. Co.*, 200 Mich. 12, 166 N. E. 492, 1 W. C. L. J. 820; *Kennedy v. Coon*. (N. J.). 106 Atl. 210, 4 W. C. L. J. 117.

72. *Creachus v. Chicago, etc. R. Co.*, (Mo.), 205 S. W. 181, 2 W. C. L. J. 809.

employing them was so engaged.⁷³ But under the 1917 amendment to the Washington Act, c. 28, p. 96, section 19, an employee is not entitled to compensation for injuries received while engaged in painting bridges situated in the state on the line of a railroad engaged in interstate commerce, although working for an independent contractor. An employee is exempted from the Washington Act when he is engaged in maintenance work upon railroads engaged in interstate or intrastate commerce.⁷⁴ An employee working as a lineman on an interstate railroad's anchor bridge, which spans its main line, is covered by the Federal Employer's Liability Act.⁷⁵

If the work in which an employee of a railroad, engaged in both interstate and intrastate commerce, was injured was a part of interstate commerce he was not entitled to compensation under the Compensation Law.⁷⁶

It has been held that a flagman killed by an automobile while he was crossing the intersection of defendant's railroad track and a city street to get his lantern was engaged in interstate commerce, depriving the Workmen's Compensation Board of jurisdiction;⁷⁷ that a plumber employed in the maintenance of ways department of an interstate carrier, engaged in repairing pipes in a station, who was killed by a train while crossing tracks in the course of his employment was not entitled to compensation since he was

73. *State v. Postal-Cable Co.*, 101 Wash. 630, 172 Pac. 902, 2 W. C. L. J. 400; *Williams v. Schaff*, — Mo. —, (1920), 222 S. W. 412, 6 W. C. L. J. 346.

74. *Luby v. Indus. Ins. Comm.*, — Wash. — 191 Pac. 855.

75. *Baker v. N. Y., N. H. & H. Ry. Co.*, — App. Div. —, 181 N. Y. Supp., 675, 6 W. C. L. J. 76.

76. *Dickinson v. Ind. Bd.*, 280 Ill. 342, 117 N. E. 438, 1 W. C. L. J. 27; *Southern Pac. R. Co. v. Indus. Comm.*, — Cal. —, 161 Pac. 1143, A 1 W. C. L. J. 213; *Flynn v. N. Y. S. & W. R. Co.*, 101 Atl. 1034, B 1 W. C. L. J. 1164; *Di Donato v. Philadelphia & Ry. Co.*, — Pa. —, 109 Atl. 625, 5 W. C. L. J. 897. Flagging intrastate train on interstate railroad.

77. *Walker v. Chicago, etc. R. Co.*, 64 Ind. App. —, 117 N. E. 969, 1 W. C. L. J. 362; *South. Pac. R. Co. v. Indus. Comm.*, — Cal. —, 161 Pac. 1139, A 1 W. C. L. J. 204; *S. P. R. Co. v. Indus. Comm.*, 161 Pac. 1142, A 1 W. C. L. J. 211; *West v. Atl. Coast Line Ry. Co.*, — N. C. — 93 S. E. 479, B 1 W. C. L. J. 1452.

engaged in interstate commerce;⁷⁸ that a servant in switch yards operating a motor to carry switchmen back and forth, and injured while hauling switchmen who had been looking after cars of coal moving within the state, but because they belonged to the company subject to reconsignment to points without the state, was not engaged in interstate commerce;⁷⁹ that where a switchman had just assisted in switching a string of 50 or 60 cars, some of which were loaded with interstate shipments, and was returning to his engine when he was struck and injured, was engaged in interstate commerce within the meaning of the Federal Employer's Liability Act;⁸⁰ that a towboat was engaged in interstate commerce so that an injured servant could not recover compensation under the Massachusetts Act;⁸¹ that where decedent at the time he received his fatal injuries was employed in interstate commerce by a railroad company on one of its boats which was being used for that purpose, the Federal Employer's Liability Act applies;⁸² that a contract by which the employee was to act as second mate in a voyage from San Francisco to a point in Canada and return was a maritime contract relating to foreign commerce within the exclusive jurisdiction of the United States Courts, and the Industrial Commission had no jurisdiction;⁸³ that a laborer, fatally injured while cleaning soot from a boiler in a railroad's power plant.

78. *Vollmers v. N. Y. Cent. R. Co.*, 180 App. Div. 160, 167 N. Y. S. 426, 1 W. C. L. J. 253.

79. *Ill. Cent. R. Co. v. Ind. Bd.*, 284 Ill. 267, 119 N. E. 920, 2 W. C. L. J. 445.

80. *Erie R. Co. v. Downs* (C. C. A.), 250, Fed. 415, 2 W. C. L. J. 599; *Phil. & R. Ry. Co. v. Hancock*, — U. S. —, 40 Sup. Ct. R. 512, 6 W. C. L. J. 247; *King v. Norfolk S. Ry. Co.*, — N. C. —, 97 S. E. 29, 3 W. C. L. J. 69; *Gaddy v. N. Carolina R. Co.*, — N. C. —, 95 S. E. 925, 2 W. C. L. J. 112; *Chicago & Erie R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659, 1 W. C. L. J. 476. *Morrison v. Commercial Towboat Co.*, 227 Mass. 237, 116 N. E. 499.

81. *Geer v. St. Louis, S. F. & T. R. Co.*, — Tex. —, 194 S. W. 939, B 1 W. C. L. J. 1521.

82. *The Erie Lighter* (D. C.), 250 Fed. 490, 2 W. C. L. J. 606; *Charlton v. Hilton Dodge Transport Co.*, 164 N. Y. S. 999, B 1 W. C. L. J. 1281.

83. *Tallac Co. v. Pillsbury*, 176 Cal. 236, 168 Pac. 17, 1 W. C. L. J. 7; *Hinson v. Atl. & C. Air Line Co.*, — N. C. —, 90 S. E. 772, B 1 W. C. L. J. 1445.

generating electricity for operation of trains partly in New York and partly in New Jersey was engaged in interstate commerce, and the Industrial Commission had no jurisdiction to make an award;⁸⁴ that the remedy of the widow of a railroad servant, killed in service, is not under the Federal Employer's Liability Act unless the particular work on which the employer was engaged at the very time of the accident was a part of the interstate commerce in which the carrier was engaged.⁸⁵

In what is probably at this time the leading case on this subject the Supreme Court of the United States said: "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" In this case it was held that one carrying bolts to be used in repairing an interstate railroad and who was injured by an interstate train was entitled to invoke the Federal Employer's Liability Act.⁸⁶

An employee performing the duties of a janitor in a railroad machine shop, injured by a splinter while breaking kindling, was not engaged in interstate commerce, though engines engaged in interstate commerce were repaired at the shop.⁸⁷

An employee killed while washing the boiler of a locomotive, not assigned to any particular work or train was not engaged in interstate commerce.⁸⁸

A watchman guarding an interstate shipment was held to be engaged in interstate commerce.⁸⁹

One who repaired an engine regularly used in interstate commerce was himself engaged in interstate commerce,⁹⁰ as was one

84. *Guida v. Penn. R. Co.*, 183 App. Div. 822, 171 N. Y. S. 285, 2 W. C. L. J. 679.

85. *Lincks v. Erie R.*, 91 N. J. Law 166, 103 Atl. 176, 1 W. C. L. 1096; *Pedersen v. Del., L. & W. R. R. Co.*, 229 U. S. 146; *Erie R. Co. v. Collins*, 253 U. S. 77.

86. *Mo. Pac. R. Co. et al. v. Mette*, 261 Fed. 755, 5 W. C. L. 475.

87. *Heed v. Ind. Comm. et al.*, 287 Ill. 505, 122 N. E. 801, 4 W. C. L. J. 27.

88. *Chicago R. I. & P. Ry. Co. v. Ind. Comm.*, 288 Ill. 126, 123 N. E. 278, 4 W. C. L. J. 159; *Reynolds v. Philadelphia & R. Ry. Co.*, — Pa. —, 109 Atl. 660, 5 W. C. L. J. 900.

89. *O'Brien v. Penn. R. Co.*, 187 N. Y. App. Div. 839, 176 N. Y. S. 390, 4 W. C. L. J. 290.

90. *Atlantic Coast Line R. Co. v. Woods*, 252 Fed. 428, 3 W. C. L. J. 6.

engaged in repairing a railroad track used in interstate commerce.⁹¹

One killed while engaged in making repairs upon cars on siding, some of which were interstate cars was engaged in interstate commerce.⁹²

Where a freight terminal was in process of construction, one engaged in wheeling brick from a car on a siding to the terminal was not engaged in interstate commerce.⁹³

Where claimant alleges that he suffered an injury while carrying drawbars from one pile to another pile in the yards, and the defendant admits this allegation by his answer, a finding that claimant was injured while loading drawbars on a car for interstate shipment, is against the evidence in the case, since under the pleadings no such evidence was admissible.⁹⁴

The Washington Compensation Act (Sec. 18) as amended in 1917 places all employees of railroads outside of the act and gives those engaged in intrastate commerce the same right of recovery as they would have under the Federal Employers Liability Act were they engaged in interstate commerce.⁹⁵

Where the employment is too remote to be considered as a part of or in furtherance of interstate commerce the compensation act applies unconditionally.⁹⁶

One engaged in cutting weeds along a railroad right of way was held not to be engaged in interstate commerce and that the State Act covered the employment, there being evidence that the weeds were being cut merely to comply with the railroad law.⁹⁷

91. *Kalashian v. Hines, etc.*, — Wis. —, 177 N. W. 602, 6 W. C. L. J. 240.

92. *Southern Pac. Co. v. Indus. Acc. Comm.*, 179 Cal. 59, 175 Pac. 453, 3 W. C. L. J. 12.

93. *Matti v. Chicago, M. & St. P. Ry. Co.*, 55 Mont. 280, 176 Pac. 154, 3 W. C. L. J. 163.

94. *Savich v. Hines*, — Wis. —, 1921, 182 N. W. 924.

95. *Spokane & I. E. Ry., et al. v. Wilson, et al.*, 104 Wash. 171, 176 Pac. 34, 3 W. C. L. J. 201.

96. *Suttle v. Hope Natural Gas Co.*, 82 W. Va. 729, 97 S. E. 429, 3 W. C. L. J. 205.

97. *Plass v. Central New England R. R. Co.*, 226 N. Y. 449, 123 N. E. 852, 4 W. C. L. J. 527, Dissenting opinion based on authority of *N. Y. C. & H. R. R. Co. v. Porter*, 249 U. S. 163, 39 Sup. Ct. 183, 63 L. Ed. 536.

That a laborer engaged in work about a train shed, picking up waste paper, etc., whose clothing caught fire while cleaning switch lamps was not employed in interstate commerce.⁹⁸

That a millwright who was injured while ripping a piece of timber that was to be used in the repair of a caboose was not engaged in interstate commerce, it not being shown that the timber was ever used or that the caboose was removed from service for repairs at the time the injury was sustained.⁹⁹

That employees of a railroad shop engaged in shifting a car of lumber about the shop preparatory to unloading it were not engaged in interstate commerce, though the lumber was eventually to be used in repair of interstate cars.¹

A general handy man around locomotives engaged in interstate commerce, providing coal, water, and attending to the moving thereof, is engaged in interstate commerce.²

It has been held that interstate commerce ceases upon the shipment reaching its destination, therefore a switchman injured while switching cars the day after they had reached their destination was not engaged in interstate commerce.³

Where an employee, belonging to a local switching crew, was injured while setting a brake on a car on a siding after it had come from Pennsylvania consigned to a point in New Jersey was not engaged in interstate commerce.⁴

One engaged in instructing motormen in how to operate motors in interstate business was employed in interstate commerce.⁵

98. *Gingliano v. Lehigh Valley R. R. Co.*, 224 N. Y. 713, 129 N. E. 869; *Killes v. G. N. Ry. Co.*, — Wash. —, 171 Pac. 69.

99. *Fish v. Ruthland R. Co.*, 189 App. Div. 352, 178 N. Y. S. 439, 5 W. C. L. J. 98.

1. *Barnett v. Coal & Coke Ry. Co.*, 81 W. Va. 251, 94 S. E. 150, 1 W. C. L. J. 280; *Mo. K. & T. Ry. Co. v. Watson*, — Tex. Civ. App. —, 195 S. W. 1177, B 1 W. C. L. J., 1581.

2. *Guy v. Cincinnati N. R. Co.*, — Mich. —, 164 N. W. 454, A 1 W. C. L. J. 924.

3. *Louisville & N. R. Co. v. Meadors' Adm'r*, — Ky. App. —, 197 S. W. 440, A 1 W. C. L. J. 692.

4. *Delaware, L. & W. R. Co. v. Peck*, 255 Fed. 261, 3 W. C. L. J. 559.

5. *Dumphy v. Norfolk & Western Ry.*, W Va. 95 S. E. 863, 2 W. C. L. J. 180.

A street railway engaged in carrying passengers between states, is a common carrier by railroad within the meaning of the Federal Employers' Liability Act.⁶

A car repairer employed by an interstate carrier was not engaged in interstate commerce while repairing a car belonging to another interstate carrier and which was to be returned to interstate commerce.⁷

Where the record fails to show whether the claimant was struck by an interstate or intrastate train, the Supreme Court will assume that it was an intrastate train.⁸

Employees appointed by the Federal government and under its control although temporarily engaged in work pertaining to and within a state, and though paid in part by the state are under the Federal Workmen's Compensation Act.⁹

An accident to an employee engaged on an interstate train and not engaged in interstate commerce is compensable under the State Act.¹⁰

It was at first quite generally held that the admiralty law not being exclusive as to cases within its jurisdiction it did not affect the jurisdiction of the State Compensation Acts over admiralty cases. "Congress having in no way legislated in the premises, at least so far as interstate commerce by water is concerned, the State has the right to enact laws incidentally affecting interstate commerce."¹¹ It was held that the injured employee must, however, elect whether he would proceed in admiralty or under the state compensation act. "A party cannot enforce both remedies and will be required to elect whether to pursue his common law remedy or proceed in admiralty. The Workmen's Compensation Act while

6. *Nelson v. Ironwood & B. Ry. & Light Company*. — Mich. —, 170 N. W. 45, 3 W. C. L. J. 327.

7. *Central R. Co. of N. J. v. Paslick*, 239 Fed. 713, A 1 W. C. L. J. 55.

8. *Payne v. Indus. Comm.* — Ill. —, (1921), 129 N. E. 830.

9. *In re Harrold R. Smalley*, 2nd A. R. U. S. C. C. 63; *In re Hamer Bobo*, 2nd A. R. U. S. C. C. 64; *In re G. W. Constable*, 2nd A. R. U. S. C. C. 65. But see *Midwest Bank v. Davis*, — Mo. —, 233 S. W. 406.

10. *Zimmerman v. New York Cent. R. Co.*, 180 App. Div. 98, 167 N. Y. S. 501, 1 W. C. L. J. 233.

11. *Stoll v. Pac. Steamship Co.*, 205 Fed. 169; L. R. A. 1916A (note) 461-465; 10 N. C. C. A. (note) 688-699.

it took away the common-law action, provided in its stead another remedy. If the libellant determined to obtain relief from the substitute which is provided for his common-law remedy, and received compensation under such act, then he can not proceed in admiralty and thus obtain double compensation for the injury of which he complains."¹² But see to the contrary *Liverani v. John T. Clark & Son*, 176 N. Y. Supp. 725, 4 W. C. L. J. 545. It was held in a Washington case that since Art. 4283 of the Federal Statutes limited the liability of the owners of a vessel, the state legislature had not the power to fix another standard or measure by means of the State Workmen's Compensation Act. This was in the case of an injury suffered by an employee on a vessel operating upon Puget Sound, and engaged in intrastate commerce.¹³ The contrary was held in a New York case where a workman was injured while working upon a navigable river; but this decision was later reversed by the United States Supreme Court.¹⁴

The preceeding paragraph is now chiefly historical in so far as it pertains to election in admiralty or under the compensation act. The decision of the Supreme Court in the case of *Southern Pac. Co. v. Jensen*, 224 U. S. 205, declared the New York Workmen's Compensation Act to be unconstitutional where it was sought to apply it to longshoremen engaged in loading or unloading vessels engaged in interstate commerce, declaring such rights and liabilities to be within the jurisdiction of admiralty. Subsequent to this decision congress enacted the amendment of October 6, 1917, to

12. *Fred. E. Sander*, 212 Fed. 545, 5 N. C. C. A. 97; *Dziengelewsky v. Turner & Blanchard, Inc.*, 176 N. Y. S. 729, 4 W. C. L. J. 445; *Riegel v. Higgins*, (Wash.), 241 Fed. 718, A 1 W. C. L. J. 80.

13. *State of Washington, ex rel. Frank Jarvis, v. Daggett et al.*, 151 Pac. 648, L. R. A. 1916A, 446; *Barrett v. MaComber & Nickerson Co.*, (R. I.), 253 Fed. 205, 3 W. C. L. J. 89; *Shaughnessy v. Northland S. S. Co.*, — Wash. —, (1917), 162 Pac. 546, B 1 W. C. L. J. 1602.

14. *Re Walker*, 215 N. Y. 529, 109 N. E. 604, Reversed by *Clyde Steamship Co. v. Walker*, 244 U. S. 255, 37 Sup. Ct. 545, 61 L. Ed. 1116, See, also, *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, Ann. Cas. 1917E, 900. Holding New York Compensation Act invalid as applying to ocean going steamships being in conflict with the constitution.

the Federal Judicial Code (Act Cong. March 3, 1911, c. 231, Sec. 24, cl. 2 and section 256, cl. 3, 36 Stat. 1001, 1160, as amended by Act. Cong. Oct. 6, 1917, c. 97, 40 Stat. 395) saving to claimants, subject to admiralty jurisdiction, the rights and remedies under the Workmen's Compensation Act of any state, which settled the controversy theretofore existing in that regard in admiralty cases, until as hereinafter mentioned the Supreme Court of the United States held this amendment to be unconstitutional.

It was held in a New Jersey case that this amendment did not validate a compensation action begun in a state court before its passage and which at the time of such passage the state court had no jurisdiction to entertain.¹⁵

Prior to the enactment of the amendment of Oct. 6, 1917, by Congress the terms of some of the compensation acts were broad enough to include employees engaged in discharging or loading cargoes upon vessels engaged in interstate commerce, but did not actually include them because of the conflict with the existing Federal Law. So the employee injured while so engaged had his remedy in Admiralty or under the common law.¹⁶

After the enactment by Congress of the above mentioned amendments the New York Court of Appeals upheld the constitutionality of the provision of the New York Act as it applies to those engaged in maritime pursuits.¹⁷

But on May 17, 1920, the Supreme Court of the United States had before it for consideration the aforementioned amendment or Act of Oct. 6, 1917, amending the Judicial Code, Sections 24, and 256, (Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sections 991 (3), and (1233), relative to the jurisdiction of federal courts, so as to save to suitors in all cases the right of a common law remedy, etc., "and to claimants the rights and remedies under the Work-

15. *Coon v. Kennedy* 91 N. J. Law 598, 103 Atl. 207, 1 W. C. L. J. 1101; *Peters v. Veasey*, 40 S. C. 65, 5 W. C. L. J. 127; *Hartman v. Toyo Kisen Kaisha S. S. Co.*, 247 Fed. 516, A 1 W. C. L. J. 85.

16. *Duart v. Simmons*, 231 Mass. 313, 121 N. E. 10; 3 W. C. L. J. 136; *Sullivan v. Hudson Nav. Co.*, 182 N. Y. App. Div. 512, 169 N. Y. S. 645, 1 W. C. L. J. 1105.

17. *Stewart v. Knickerbocker Ice Co.*, 229 N. Y. 302, 123 N. E. 382, 4 W. C. L. J. 271.

men's Compensation Law of any state," which amendment seeks to authorize and sanction actions by the states in prescribing and enforcing rights, obligations, liabilities and remedies designed to provide compensation under the Compensation Acts of the several states for injuries to employees engaged in maritime work, and as so construed, the court held it to be beyond the power of Congress, on the ground that its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement cannot be delegated to the states, especially as it would destroy the uniformity contemplated by the Constitution. The court said: "While employed by Knickerbocker Ice Company as a bargeman and doing work of a maritime nature, William M. Stewart fell into the Hudson river and drowned—August 3, 1918. His widow, defendant in error, claimed under the Workmen's Compensation Law of New York (Consol. Laws c. 67); the Industrial commission granted an award against the company for her and the minor children; and both Appellate Division and the Court of Appeals approved it. *Stewart v. Knickerbocker Ice Co.*, 226 N. Y. 302, 123 N. E. 382. The latter concluded that the reasons which constrained us to hold the Compensation Law inapplicable to an employee engaged in maritime work—*Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900,—had been extinguished by "An act to amend Sections twenty-four and two hundred fifty-six of the Judicial Code, relating to the jurisdiction of the District Courts, so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any State" approved October, 6, 1917. 40 Stat. c. 97 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sections 991 (3), 1233).

"The provision of Section 9, Judiciary Act, 1789, (1 Stat. 76, c. 20) granting to the United States District courts 'exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it,' was carried into the Revised Statutes (secs. 563 and 711, Comp. St. Sec. 1233) and thence into the Judicial Code (clause 3, secs. 24 and 256, Comp. St. sec. 991 (3), 1233.) The saving clause remained unchanged until the

statute of October 6, 1917, added "and to claimants the rights and remedies under the Workmen's Compensation Law of any State." In *Southern Pacific Co. v. Jensen* (May, 1917), 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, we declared that under Section 2, Article III, of the Constitution ('The Judicial Power shall extend to * * * all cases of admiralty and maritime jurisdiction') and Section 8, Article I (Congress may make necessary and proper laws for carrying out granted powers), in the absence of some controlling statute the general maritime law as accepted by the Federal Court, constitutes part of our national law applicable to the matters within admiralty and maritime jurisdiction, also that 'Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.' And we held that, when applied to maritime injuries, the New York Workmen's Compensation Law conflicts with the rules adopted by the Constitution and to that extent is invalid. The necessary consequence would be destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.

"We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common law remedies, whereas the remedy prescribed by the compensation law was unknown to the common law and incapable of enforcement by the ordinary processes of any court. Moreover, if applied to maritime affairs, the statute would obstruct the policy of Congress to encourage investments in ships.

"In *Chelentis v. Luckenbach S. S. Co.*, (June, 1918), 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, an action at law seeking full indemnity for injuries received by a sailor while on ship-board, we said:

"Under the doctrine approved in *Southern Pacific Co. v. Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a

substitution would distinctly and definitely, change or add to the settled maritime law; and it would be destructive of the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'

And, concerning the clause, 'saving to suitors' in all cases the right of a common law remedy where the common law is competent to give it,' this:

"In *Southern Pacific Co. v. Jensen*, we definitely ruled that it gave no authority to the several States to enact legislation which would work 'material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations.' Under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common law standards rather than those of the maritime law.

"Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the States so to do. It referred only to remedies and to the extent specified permitted continued enforcement by the state courts of rights and obligations founded on maritime law.

"In *Union Fish Co. v. Erickson*, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261, an admiralty cause, a master sought to recover damages for breach of an oral contract with the owner of a vessel for services to be performed principally upon the sea. The latter claimed invalidity of the contract under a statute of California, where made, because not in writing and not to be performed within a year. We ruled:

'The Circuit Court of Appeals correctly held that this contract was maritime in its nature and an action in admiralty thereon for its breach could not be defeated by the statute of California relied upon by the petitioner. In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties

to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made. See also *The Blackheath*, 195 U. S. 361, 365, 25 Sup. Ct. 46, 47, 49 L. Ed. 236.'

"As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purpose of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

"Since the beginning, Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago.

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. * * * One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse

of the States with each other or with foreign states. *The Lottawanna*, 21 Wall. 558, 574, 575 (22 L. Ed. 654).

"The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is quite impossible to account for a multitude of adjudications by the admiralty courts. See *Workman v. New York City*, 179 U. S. 552, 557, et seq.; 21 Sup. Ct. 212, 45 L. Ed. 314.

"The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten. Also it should be noted that Federal laws are constantly applied in State courts; unless inhibited, their duty so requires. Constitution, Art. VI, Clause 2; *Second Employer's Liability Cases*, 223 U. S. 55, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. Consequently mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts, could not create substantive rights or obligations or indicate assent to their creation by the States.

"When considered with former decisions of this court, a satisfactory interpretation of the Act of October 6, 1917, is difficult, perhaps impossible. *The Howell* (D. C.) 275 Fed. 578, and *Rohde v. Grant Smith Porter Co.* (D. C.) 259 Fed. 304, illustrate some of the uncertainties. In the first, the District Court in New York dismissed a libel, holding that rights and remedies prescribed by the Compensation Law of that State are exclusive and pro tanto supersede, the maritime law. In the second, the District Court of Oregon ruled that when an employee seeks redress for a maritime tort by an admiralty court, rights obligations and liabilities of the respective parties must be measured by the maritime law and these cannot be barred, enlarged or taken away by state legislation. Other difficulties hang upon the unexplained words 'workmen's compensation law of any State.'

"Moreover, the Act only undertook to add certain specified rights and remedies to a saving clause within a code section conferring jurisdiction. We have held that before the amendment

and irrespective of that section, such rights and remedies did not apply to maritime torts because they were inconsistent with paramount Federal law—within that field they had no existence. Were the added words therefore wholly ineffective? The usual function of a saving clause is to preserve something from immediate interference—not to create; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it. Endlich, *Interpretation of Statutes*, Sec. 372.

“Neither branch of Congress devoted much debate to the Act under consideration—altogether, less than two pages of the Record (65 Cong. pp. 7605, 7843). * * * Having regard to all these things we conclude that Congress undertook to permit application of Workmen’s Compensation Laws of the several States to injuries within the admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out by *Southern Pacific Co. v. Jensen*. It sought to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

“And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

“Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a

compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant. See *Sudden & Christenson Industrial Accident Commission*, (Cal.) 188 Pac. 803.

“Congress cannot transfer its legislative power to the States—by nature this is non-delegable. In *re Rahrer*, 140 U. S. 545, 560; 11 Sup. Ct. 865, 35 L. Ed. 572; *Field v. Clark*, 143 U. S. 649, 692; 12 Sup. Ct. 495, 36 L. Ed. 294; *Buttfield v. Stranahan*, 192 U. S. 470, 496, 24 Sup. Ct. 349, 48 L. Ed. 525; *Butte City Water Co. v. Baker*, 196 U. S. 119, 126, 25 Sup. Ct. 211, 49 L. Ed. 409; *Interstate Com. Comm. v. Goodrich, Transit Co.*, 224 U. S. 194, 214, 32 Sup. Ct. 436, 56 L. Ed. 729.

“In *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, notwithstanding the contention that it violated the Constitution—Art. I, Sec. 8, Clause 3—this court sustained an act of Congress which prohibited the shipment of intoxicating liquors from one State into another when intended for use contrary to the latter's laws. Among other things, it was there stated that—

‘The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress,’ i. e., Congress itself forbade shipments of a designated character.

And further:

‘The exceptional nature of the subject here regulated it the basis upon which the exceptional power exerted must rest,’ i. e., different considerations would apply to innocuous articles of commerce.

“The reasoning of that opinion proceeded upon the postulate that because of the peculiar nature of intoxicants which gives enlarged power concerning them, Congress might go so far as

entirely to prohibit their transportation in interstate commerce. The state did less.

“We can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (Which is what was done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accept the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power.

See *Delameter v. South Dakota*, 205 U. S. 93, 97, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 753.

“Here we are concerned with a wholly different Constitutional provision—one which for the purpose of securing harmony and uniformity, prescribes a set of rules, employs Congress to legislate to that end, and prohibits material interference by the States. Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.

“In the *Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, an admiralty proceeding, effect was given, as against a ship registered in Delaware, to a statute of that State which permitted recovery by an ordinary action for fatal injuries, and the power of a State to supplement the maritime law to that extent was recognized. But here the state enactment prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court. See *N. Y. Cent. R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, L., Ann. Cas. 1917D, 629 N. Y. Cent. R. R. v. *Winfield*, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; *Southern*

Pacific Co. v. Jensen, *supra*. The doctrine of *The Hamilton* may not be extended to such a situation.

"The judgment of the court below must be reversed and the cause remanded with directions to take further proceedings not inconsistent with this opinion."¹⁸

Whether a tort is exclusively maritime in nature is to be determined by the locality of the act, and the fact that one is injured in the performance of a maritime contract does not in itself determine the character of the tort. So where a person was knocked from a wharf by the movement of a pile of lumber and struck upon logs and timbers in the river and there was no attempt to show that his death was the immediate result of being struck by the lumber on the wharf, it could not be said as a matter of law that the tort was maritime so as to prevent recovery under the Employers' Liability Act or Workmen's Compensation Act of California.¹⁹

§ 47. **Extra Territorial Application of Acts.**—Many of the American Acts expressly or impliedly provide that they shall apply to injuries received outside the state if the contract of employment was made in the state. Others omit all reference to extra territorial application, and still others expressly provide that the act shall not apply to injuries received outside the state. A substantial difficulty presents itself as to those acts which expressly state that "this act shall apply to all injuries received in this state, regardless of where the contract of employment was made, and also to all injuries received outside of this state under contracts of employment made in this state, unless the contract of employment in any such case shall otherwise provide."

It will be noticed that such provisions deny jurisdiction to the acts of other states over injuries received in "this state" if the contract of employment was made in some other state, but give

18. *Knickerbocker Ice Co. v. Stewart*, 252 U. S. —, 40 Sup. Ct. R. 438, 6 W. C. L. J. 119; *Berg v. Philadelphia & R. Ry. Co.*, 266 F.2d. 591, 6 W. C. L. J. 621; *Lund v. Griffith & Sprague*, — Wash. —, 183 Pac. 123, 4 W. C. L. J. 654; *Lawson v. N. Y. & P. R. S. S. Co.*, — La. —, 86 So. 815 (1921); *Dorman's Case*, — Mass. —, 129 N. E. 352, (1921).

19. *Rorvik v. N. Pac. Lbr. Co.* (1921), — Ore. —, 195 Pac. 163.

themselves jurisdiction in similar cases. The question therefore arises as to which law applies where a contract of employment is made in a state whose act contains the above provisions but the injury occurs in another state whose act has a similar provision.

It would appear, therefore, in the case of an employee injured in Missouri, in the performance of a contract made in Indiana, that he would have the right at his option to proceed against his employer either under the Missouri Act, or the Indiana Act, or perhaps even under both, as in reply to the contention that to give an Act extra territorial operation might permit a double recovery, the New Jersey Court said: "Recovery of Compensation in two states is no more illegal, and is not necessarily more unjust, than recovery upon two policies of accident or life insurance."²⁰ To thus allow double recovery, is in the author's opinion bad policy and contrary to one of the fundamental principles of Workmen's Compensation, in that if the employee were to receive more compensation while disabled than while working the temptation to malingering and prolong his period of disability would be great. In addition this would be penalizing the employer for his industry in extending his business to other states. Not to mention questions of interstate comity and *res adjudicata*. The author prefers in such cases as a matter of comity, the theory of concurrent jurisdiction.

While elective acts are by most American authorities considered contractual, in that they become part of the contract of employment and are held to follow the employee to the place of performance of the contract,²² regardless of express language to

20. *Rounsaville v. Central R. Co.*, 87 N. J. Law, 371, 94, Atl. 392.

22. *Gooding v. Ott*, 77 W. Va. 487, 87 S. E. 862; *State v. District Court*, 139 Minn. 305, 168 N. W. 177, 2 W. C. L. J. 524; *Hagenbach v. Leppert*, 64 Ind. App. —, 177 N. E. 531. 1 W. C. L. J. 64; *Shanahan v. Monarch Engineering Co.*, 219 N. Y. 469, 114, N. E. 795; *Jenkins v. Hogan & Sons*, 177 App. Div. 36, 163 N. Y. S. 707; *Industrial Comm. v. Aetna Life Ins. Co.*, 64 Colo. 480, 174 Pac. 589, 2 W. C. L. J. 759; *Grimmell v. Wilkinson*, 39 R. I. 447, 98 Atl. 103; *Pierce v. Bekins Van &*

that effect in the act, yet the right to compensation rests primarily, according to some authorities, on the statute,²³ rather than on the contract of employment. So the New Jersey Act has been held to apply where the contract of employment was made in another state though it required services to be performed in New Jersey where the employee was injured, the court saying: "The Workman's Compensation Act indicates a public policy of the state, which will be enforced even as against a contract made in another state."²⁴ It also appears logical that since the compensation acts are considered an exercise of the police power of the states, that the compensation act, if any, of the state where the accident occurred, should apply rather than the place of the making of the employment contract.²⁵ On these theories, as well as under the express language of the Act, the employee injured in Missouri, though having contracted for his employment in Indiana, would have the right to obtain compensation under the Missouri Compensation Act. (See *Douthwright v. Chaplin*, 91 Conn. 524, 100 Atl. 97 Ann. Cas. 1917E 512). But the questions that then confront him are, can he obtain service on his employer in Missouri, can he sue his employer for damages at common law because the employer may not have insured his risk under the Missouri Act, or may he go back to Indiana, obtain service on his employer and enforce the Missouri Act before some Indiana Tribunal, or must he in Indiana under these facts, proceed under the Indiana Act?

Unfortunately these and many related questions will have to be left for the most part to future determination by the courts and legislative amendments to existing Statutes, as the decisions

Storage Co., — Ia. —, 172 N. W. 191, 4 W. C. L. J. 78; *Anderson v. Miller Scrap Iron Co. et al.*, 169 Wis. 106, 170 N. W. 275, 3 W. C. L. J. 389.

23. *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 162 Pac. 93.

24. *American Radiator Co. v. Rogge*, 86 N. J. Law, 436, 92 Atl. 85, Affirmed in 87 N. J. Law, 314, 93 Atl. 1083; *Davidheiser v. Hay Foundry & Iron Works*, 87 N. J. Law 688, 94 Atl. 309; *West Jersey Trust Co. v. Philadelphia & R. Ry. Co.*, 88 N. J. Law, 102, 95 Atl. 753.

25. *Perliss v. Lederer*, 180 App. Div. 429, 178 N. Y. S. 449, 5 W. C. L. J. 108; *Union Bridge & Const. Co. v. Industrial Comm.*, 287 Ill. 396, 122 N. E. 609, 3 W. C. L. J. 690.

to date concern themselves principally with the question of whether or not the legislature of any State intended the compensation act of that State to have extraterritorial effect,²⁶ and the results of the affirmative or negative determination of that question.

Under the decisions it is conceded that the State has power to pass an act that will apply to injuries suffered by an employee in another state.²⁷ Under such provision of the California Act it was held that the term "resident" applies only to citizens or to aliens domiciled within the state.²⁸ Though when the question was first raised in America, our courts and commissions were inclined to follow the decisions of the British Courts to the effect that, except as to seamen for whom express provision is made, the English Act applies only within the territorial limits of the United Kingdom.²⁹

Where a contract was entered into in New York for services to be performed wholly in Pennsylvania, the court said; "There is no doubt that a contract made within the state of New York for services to be performed wholly in a sister state is without the police power of the state of New York and does not give a

26. *Gould v. Sturdevant* (In re American Mut. L. Ins. Co.), 215 Mass. 480, 102 N. E., 693 4 N. C. C. A. 60; *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, L. R. A. (1916), A. 436. 94 Atl. 372; *Matter of Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, 10 N. C. C. A. 888; *American Radiator Co. v. Rogge*, 86 N. J. Law 436; 92 Atl. 85, 7 N. C. C. A. 144; *Bradbury's Annotation* 9 N. C. C. A. 919.

27. *Gould v. Sturdevant* (In re American Mutual Liability Ins. Co.), 215 Mass. 480; 102 N. E. 693; 4 N. C. C. A. 60; *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386; *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 162 Pac. 93; *Pierce v. Bekins Van & Storage Co. (Ia.)*, 172 N. W. 191, 4 W. C. L. J. 78; *Gooding v. Ott*, 77 W. Va. 487, 87, S. E. 862; *Post v. Burger & Golke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B 158; *Foughty v. Ott*, 80 W. Va. 88, 92 S. E. 143, 15 N. C. C. A. 919; *Jenkins v. T. Hogans & Sons, Inc.*, 177 N. Y. App. Div. 36, 163 N. Y. S. 707; *Deeny v. Wright & Cobb Co.*, 36 N. J. L. J. 121; *Foley v. Home Rubber Co.*, 89 N. J. L. 474, 99, Atl. 624, 13 N. C. C. A. 1014.

28. *Quong Ham Wah Co. v. Indus. Comm.*, — Cal. —, 192 Pac. 1021, 7 W. C. L. J. 12.

29. *Tomalin v. Pearson & Son* (1909) 2 B. W. C. C. 1, 100 L. T. N. S. 685; *Schwartz India Rubber etc. Co.*, 5 B. W. C. C. 390, 106 L. T. N. S. 706; *Hicks v. Maxton*, 1 B. W. C. C. 150.

right to compensation under our Workmen's Compensation Law. (Consol. Laws. c. 67.)"³⁰

An employee injured in Idaho while engaged in extrahazardous work and who brought his action in Washington, would be bound by the Washington Law, in the absence of pleading the Idaho law, and as the Washington law brought him under the Compensation Act, he could not maintain an action at law.³¹

In a leading case involving an injury sustained outside the state of Massachusetts the court said: "In the absence of unequivocal language to the contrary it is not to be presumed that statutes respecting this matter are designed to control conduct or fix the rights of parties, beyond the territorial limits of the state."³² Before the Illinois act was amended to make it compulsory as to extrahazardous employments the Supreme Court of Illinois said: "The Compensation Act has been held on account of its elective features, to create a contract obligation, but the obligation so created is that the employer will provide and pay compensation according to the provisions of the act and he does not agree to provide and pay compensation for injuries not included within the Act (Citing *In re Gould*, 215 Mass. 480). The decision was within the rules that the act being elective in its nature every provision of the act became a part of the contract, and the employer became bound to pay according to the terms of the act. The Workmen's Compensation Act of this state is remedial in its nature and should be liberally construed to carry out its beneficent object, but there is no provision of the act which can be construed to authorize compensation for an injury occurring outside of the State."³³ In contrast, Bradbury in the

30. *Perlis v. Lederer* (N. Y.) 178 N. Y. S. 449, 5 W. C. L. J. 108; In another New York district it was held to the contrary by the Municipal Court of the City of New York in the case of *State Ind. Com'n. of N. Y. v. Barene et al.*, 177 N. Y. S. 689, 4 W. C. L. J. 630.

31. *Freyman v. Day et al.* (Wash.), 182 Pac. 940, 4 W. C. L. J. 652.

32. *In re Gould*, 215 Mass. 480, 4 N. C. C. A. 60, 102 N. E. 693, Ann. Cas. 1914D, 372; *Cogliano v. Ferguson* (Mass.) 117 N. E. 45.

33. *Union Bridge & Construction Co. v. Industrial Comm. et al.*, 287 Ill. 396, 122 N. E. 609, 3 W. C. L. J. 690. But see *Friedman Mfg. Co. v. Ind. Comm.*, 284 Ill. 554, 120 N. E. 460, 3 W. C. L. J. 21.

3rd edition of his work, makes the following statement, p. 86: "In those states where compulsory acts are in force it may perhaps be said that there is no contract between the employer and the employee, but that a specific duty is imposed upon the employer by force of the statute." The following quotation of the Supreme Court of Connecticut, which quotes the same author, is also pertinent: "Where, as with us, the determination of the award is committed to a board or commission under a specified procedure, there will be serious obstacles to the enforcement of the contract in a foreign jurisdiction. Bradbury's Workmen's Compensation Law (Ed. 1914) p. 52. If it should be necessary to so rule, no hardship would result. The parties in interest would be relegated to the place where they had elected to make their contract and no questions of conflict of laws could arise. At the base of this question is the character of the compensation. Mr. Bradbury, repudiating his earlier view, stoutly maintains that, if the act be contractual, the contracts arising will, unless a contrary intent appears, be found to cover injuries without as well as within the state. We think his later conclusion sound and one which will prove beneficial alike to employer and employee."³⁴

Contrast this again with the following from the opinion of the court in the case of *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620, where the employee contracted for his employment in Minnesota, but was injured in Wisconsin, where he and his employer had accepted the compensation Act, and he then brings this action for common law damages in Minnesota.

"But although plaintiff's cause of action is predicated upon his relation of a servant to defendant, and the latter's obligations as master it is nevertheless one in tort. As to such actions, the law is well settled that the liability or right of action is determined by the law of the place where the injury is inflicted without regard to the law of the forum or the law of the place where the contract is made. (Authorities cited.) This eliminates from consideration the law of the place where the contract of employment was made in determining what redress plaintiff may have for the

34. *Kennerson v. Thames Towboat Co.*, 89 Conn. 367; 94 Atl. 372 L. R. A. (1916) A. 436 n.

injuries received when working for defendant in Wisconsin. Plaintiff must resort to the law as it is in that State to find his right to relief."

It was said in *Deeny v. Wright & Cobb Lighterage Co.*, 36 N. J. L. J. 121, 7 N. C. C. A., note 144: "The statute can have no extraterritorial effect, but it can require a contract to be made, by two parties to a hiring, that the contract shall have an extraterritorial effect. The contract is binding on the employee himself and upon the employer, and it is conclusively presumed that the parties have accepted the provisions of section 2, and have agreed to be bound thereby. * * * It would seem that the reasonable construction of the statute is, that it writes into the contract of employment certain additional terms. The cause of action of the petitioner is *ex contractu*. The *lex loci contractus* governs the construction of the contract and determines the legal obligations arising from it."

It has been held in a New York case that: "When the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right."³⁵ But in the case of an Alabama statute which provided that rights thereunder could be enforced in the courts of Alabama only, and a Georgia court took jurisdiction of a case under the Alabama statute this procedure was upheld by the Supreme Court of the United States.³⁶ Since the powers and jurisdiction of the various and special tribunals, courts, boards, commissions etc., through which the compensation acts of the different states are administered differ in more or less material respects in every instance, it will be seen that the doctrine announced in the New York case presents a very practical problem and one which cannot be easily solved by the employer who does business in several states, electing to come under the compensa-

35. *Loomis v. Lehigh Valley R. R. Co.*, 208 N. Y. 312; 101 N. E. 907; *Lehman v. Ramo Films Inc.*, 92 Misc. 418, 155 Supp. 1032; *McCarthy v. Mc Alister Steamboat Co.*, 94 Misc. 692, 158 Supp. 563.

36. *Tennessee Coal Co. v. George*, 233 U. S. 354, 34 Sup. Ct. 587; 55 L. Ed. 997.

tion act of each state if under its provisions he is given that option. This question did not arise under the common law system as the regular courts of each state could take jurisdiction.

It was held in an Indiana case that a circus company not having given any notice of non-acceptance of the act, it was held liable for the death of an employee, although the contract of employment made in another state, provided that the liability of the parties should be governed by the laws of the state where the contract was made.³⁷

Where an insurer contracted to pay in the manner provided by the laws of such states as were in force at the time the policy took effect, or any subsequent amendments thereto, the insurer was held liable for an injury to an employee injured in Louisiana under Texas employment where an amendment made the act applicable to employees hired in Texas though the injury occurred outside of the state.³⁸

It has been held that where an accident occurred in a compensation state having a presumptive election clause and the employment contract was made in a state having no compensation act, the compensation law of the state of the accident applied.³⁹ It was held that one hired in Missouri to work in a smelter in Illinois, which work is extra hazardous, knowing the character of the work placed him under the Illinois Compensation Act, was bound by it and could not sue in Missouri under the common law.⁴⁰ But in the case of an accident happening in a compensation state, and the contract was made elsewhere, or in the noncompensation state, where the action is brought, it was held that the compen-

37. *Carl Hagenbeck & Great Wallace Show Co. v. Randall*, — Ind. App. —, (1920), 126 N. E. 501, 504, 5 W. C. L. J. 827, 830; *Smith v. Heine Safety Boiler Co.*, — Me. —, (1921), 112 Atl. 516.

38. *Home Life & Acc. Co. v. Orchard* — Tex. Civ. App. —, (1921), 227 S. W. 705.

39. *Douthwright v. Chaplin*, 91 Conn. 524, 100 Atl. 97, 15 N. C. C. A. 870, Ann. Cass. 1917E, 512; *American Radiator Co. v. Rogge*, 86 N. J. Law 436, 92 Atl. 85, 7 N. C. C. A. 144.

40. *Mitchell v. St. Louis Smelting & Refining Co. (Mo.)*, 215 S. W. 506, 5 W. C. L. J. 82.

sation act of the state where the accident occurred would not be enforced.⁴¹

In the case of a German subject employed in a German port, injured while the ship was in New York Harbor, it was held that the plaintiffs exclusive remedy was under the German Workmen's Compensation Act.⁴²

Where the deceased was employed in New Jersey by a New Jersey corporation, and had accepted the compensation act of that state, it was held that an action could not be maintained in New York, for his death occurring in New Jersey though service could not be had upon the Corporation to enable the claimants to proceed under the act in New Jersey.⁴³ It has been held that where an injured person was induced to invoke the New Jersey statute, under which an award was made, and the insurer made some payments he was not thereby deprived of his rights under the New York Law; the insurer merely being credited with the amount paid;⁴⁴ that where a claimant received a letter in New York, offering him employment in Pennsylvania, and made no response, but soon went there and entered into a written contract of employment, and was there injured, he is not entitled to an award under the New York law;⁴⁵ that the New York Act does not apply to an employer who moved his plant from the state before the passage of the act, retaining only a sales agency in the state, although the employee who was injured contracted with the said employer, while his plant was in New York;⁴⁶ that

41. *Pensabene v. Auditore Co.*, 155 App. Div. 368, 140 Supp. 263; *Hamm v. Rockwood Sprinkler Co.*, 88 N. J. Law, 564, 97 Atl. 730; *Royal Indemnity Co. v. Platt & Washburn Refining Co.*, 98 Misc. Rep. 631, 163 N. Y. S. 197.

42. *Schweitzer v. Hamburg American Line*, 78 Misc. 448, 138 Supp. 944. But see *Kruse v. Pillsbury*, 174 Cal. 222, 162 Pac. 891.

43. *Verdicchio v. McNab, etc. Mfg., Co.*, 178 App. Div. 48, 164 N. Y. S. 290, 15 N. C. C. A. 874.

44. *Gilbert v. Des Lauriers Column Mould Co.*, 180 App. Div. 59, 167 N. Y. S. 274, 1 W. C. L. J. 232, 15 N. C. C. A. 878, 926.

45. *Thompson v. Foundation Co.*, 188 App. Div. 506, 177 N. Y. Supp. 58, 4 W. C. L. J. 442.

46. *Smith v. Heine Safty Boiler Co.*, 224 N. Y. 9, 119 N. E. 878, 2 W. C. L. J. 540.

where an employee maintained a home in another state, but for convenience, while at work kept a room in New York and there contracted for employment with defendant, but was injured while at work, outside the state, it was held he could claim compensation under the law of the state where the contract was made;⁴⁷ that where the employment contract was made in Pennsylvania and performed in Massachusetts, the New York Act could not apply even though both parties were residents of New York;⁴⁸ that a workman hired in New York and injured in Canada, is covered by the New York Act;⁴⁹ that the Connecticut Act applies to an injury suffered in that state, even though the contract of employment was made in New York;⁵⁰ that where the employment contract was made in Connecticut by residents thereof, and the employee was injured in Canada the Connecticut Act applied;⁵¹ that where the employment contract was made in New Jersey where the accident occurred, and the employee sued in New York, his right to recover was governed by the New Jersey Act;⁵² that where the contract was made in New York four years previous to the injury in Pennsylvania, and the employment had not been continuous and did not contemplate any work by the employee in New York, its act did not apply;⁵³ that where an employee was injured in Kansas and accepted compensation

47. *Jenkins v. Hogan & Sons*, 177 App. Div. 36, 163 N. Y. S. 707; *Matter of Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, 10 N. C. C. A. 888; *Spratt v. Sweeny*, 168 App. Div. 403, 153 N. Y. Supp. 505, 9 N. C. C. A. 918; *Holmer v. Communipaw Steel Co. et al.* 186 N. Y. App. Div. 645, 174 N. Y. S. 772, 3 W. C. L. J. 646.

48. *Dissoway v. Jallade*, 7 N. Y. St. Dep. Rep. 449.

49. *Kennedy v. Kennedy Mfg. & Eng. Co.*, 7 N. Y. St. Dep. Rep. 383.

50. *Coehn v. Union News Co.*, 1 Conn. Comp. Dec. 62. Same Ruling as to New Jersey Act. *West Jersey Trust Co. v. Philadelphia & R. Ry. Co.*, 88 N. J. Law, 102, 95 Atl. 753; *Banks v. Albert D. Howlett Co. et al.*, 92 Conn. 368, 102 Atl. 822, 1 W. C. L. J. 502.

51. *Welton v. Waterbury Rolling Mill.*, 1 Conn. Comp. Dec. 78.

52. *Waselewski v. Warner Sugar Refining Co.*, 87 Misc. Rep. 156, 149 N. Y. Suppl. 1035; *Pansabene v. F. & J. Auditore Co.*, 78 Misc. Rep. 538, 138 N. Y. Supp. 947; *Prdich v. N. Y. C. R. Co.*, 183 N. Y. S. 87, 6 W. C. L. J. 496, (1920).

53. *Gardner v. Horseheads Const. Co.*, 171 N. Y. App. Div. 66, 156 N. Y. Supp. 899, 15 N. C. C. A. 924.

under the provisions of the Kansas Compensation Act, he had no common law action for damages, in Missouri or elsewhere, in which he could assign an interest, because he was bound by the remedy given by the Kansas Compensation Act which he had elected to accept.⁵⁴

Where a business is localized in Minnesota the Act compensates for injuries though sustained outside the state.⁵⁷

Where the Employee was a resident of New Jersey, employed by a New Jersey Corporation by contract entered into in New Jersey, compensation is governed by the New Jersey Act though the accident occurred in New York.⁵⁸

Where the employee did not enter into a contract with the employer in New York, was not a resident of New York and did not perform the service in New York, he cannot come under the New York Act even though the employer is a New York Corporation.⁵⁹

Nor can the employer bring the employee who is a resident of New Jersey under the New Jersey Act when the employer is a New York Corporation, the contract or hiring being executed in New York and the accident occurring there.⁶⁰

Where the employer and employee were residents of Pennsylvania and entered into a contract in New Jersey for services to be rendered there the Compensation Law of New Jersey was held to apply.⁶¹

54. *Piatt v. Swift & Co.*, 188 Mo. App. 584, 176 S. W. 434.

57. *State ex rel. Chamber v. Dist. Court, Hennepin County et al.*, 139 Minn. 205, 166 N. W. 185, 1 W. C. L. J. 638, 15 N. C. C. A. *State ex rel. Maryland Cas Co. v. Dist. Court, Rice County, et al.*, 140 Minn. 427, 168 N. W. 177, 2 W. C. L. J. 524.

58. *Barnhardt v. American Concrete Steel Co. (N. Y.)* 181 App. Div. 881, 167 N. Y. S. 475, 1 W. C. L. J. 246, 15 N. C. C. A. 874; *Decided in Court of Appeals*, 125 N. E. 675, 5 W. C. L. J. 567.

59. *Bags v. Standard Oil Co. of New York*, 180 N. Y. S. 560, 5 W. C. L. J. 740.

60. *Hamm v. Rockwood Sprinkler Co.*, 88 N. J. L. 564, 97 Atl. 730, 15 N. C. C. A. 876.

61. *Bonner v. Tucker Stevedoring Co.*, 25 Pa. Dist. Rep. 600, 15 N. C. C. A. 875.

It has been held that no action can be maintained to recover under the Alaska Compensation Act in any court outside the territory of Alaska.⁶²

The provision of the California Act for subrogation to the rights of an injured employee, will not be enforced in Oregon, because in Oregon a tort action is not assignable. Therefore, a claim against the deceased's employer, a California Corporation, deceased being a resident of that state, will not preclude the widow's recovery against the negligent third party in Oregon on the theory that the employer was subrogated to his rights, and the widow may sue the third party and recover full compensation.⁶³

The following provisions and in some instances the substance of the provisions, of the various acts and cases cited, will throw further light upon this complex subject.

ALABAMA: *Section 5b.* When an accident occurs while the employee is elsewhere than in this State which would entitle him or his dependents to compensation had it happened in this State, the employee or his dependents shall be entitled to compensation under this act if the contract of employment was made in this state unless otherwise expressly provided by said contract, and such compensation shall be in lieu of any right of action and compensation for injury or death by the laws of any other State.

ALASKA: *Section 22.* No action for the recovery of compensation hereunder shall be brought in any court holden outside of the judicial division in which the injury occurred, out of which the right to compensation arises except in cases where service cannot be had on the employer in the judicial division where the injury occurred. Any attempt to bring such action in any court outside of the Territory of Alaska shall work a forfeiture of the right of the plaintiff in such action to compensation under this Act. *Martin v. Kennecott Copper Corp.*, 252 Fed. 207.

ARIZONA: *Section 59.* Act applies to injuries received outside the State if workman was hired in the State. Rights to compensation under law of another State are enforceable in Arizona, if of such nature that they can be dealt with by Arizona Commission and courts.

62. *Martin v. Kennecott Copper Corp.*, 252 Fed. 207.

63. *Rorvik v. Northern Pac. Lbr. Co.—Oregon—*, (1920), 190 Pac. 331, 6 W. C. L. J. 385. See *Anderson v. Miller Scrap Iron Co.*, — Wis. —, 182 N. W. 853.

CALIFORNIA: *Section 58.* The Commission has jurisdiction over injuries sustained outside of the State if the employee was a resident of the State and the contract of hire was made within the State. *North Alaska Salmon Co. v. Pillsbury*, — Cal. —, 162 Pac. 93; *Kruse v. Pillsbury*, Id. 891; *McManns v. Red Salmon Canning Co.*, (Cal.) 173 Pac. 1112.

COLORADO: No provision in the act but it has been held that the act applies to injuries sustained outside of the state where the contract of employment was made within the state. *Indus. Comm. v. Aetna Life Ins. Co.*, 174 Pac. (Colo.) 589, 17 N. C. C. A. 955.

CONNECTICUT: *Section 5388.* Applies to contracts of service, whether such contract contemplated the performance of duties within or without the state. *Douthwright v. Champlin*, (Conn.) 100 Atl. 97, 14 N. C. C. A. 91, 95.

DELAWARE: *Section 94*, 3193a. No extraterritorial application.

GEORGIA: Act applies to injuries sustained outside the State if contract of hire was made within the State and if employer's place of business is in the State or if employee lives within the State, unless the contract was expressly for service exclusively outside the State. But if employee receives compensation or damages under the law of another State, total compensation shall not exceed that provided by the Act. (§ 37).

HAWAII: *Section 27.* Act extends to injuries received outside the Territory, if employee was hired within Territory. If hired outside the Territory, and entitled to compensation under the law of the State or Territory in which hired, his rights will be enforced to the extent that they can reasonably be determined in Hawaii. Jurisdiction of Boards extends to injuries received on vessels operated by residents of Territory.

IDAHO: *Section 62*, 6. If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this State even though such injury was received outside of this State.

If a workman who has been hired outside of this State is injured while engaged in his employer's business, and is entitled to compensation for such injury under the law of the State where he was hired, he shall be entitled to enforce against his employer his rights in this State if his rights are such that they can reasonably be determined and dealt with by the Board and the Courts of this State.

Employers, who hire workmen within this State to work outside the State, may agree with such workmen that the remedies under this Act shall be exclusive as regards injuries received outside this State by accident arising out of and in the course of such employment; and all contracts of hiring in this State shall be presumed to include such an agreement.

- ILLINOIS:** No extraterritorial application. See *Friedman Mfg. Co. v. Indus. Bd.*, 120 N. E. 460; *Union Bridge and Const. Co. v. Indus. Comm.*, 122 N. E. 609.
- INDIANA:** *Section 20.* Act applies to injuries whether sustained within the State or in another State or country. But employment in a mine where shaft or opening is in another State, is subject only to law of that State. (Chapter 169, Acts of 1919). *Hagenback v. Leppert*, — Ind. —, 117 N. E. 531.
- IOWA:** No provision; but see section 2477-m 29, which indicates that the Act is intended to cover injuries sustained outside the State. See also *Pierce v. Bekins Van & Storage Co.*, — Ia. —, 172 N. W. 191, 4 W. C. L. J. 78. Which holds that the act being elective is contractual, in that it becomes part of the contract of employment and is held to follow the employee to the place of performance of the contract.
- KANSAS:** *Section 5930.* No action or proceeding under the Act may be brought outside of the State; and notice to non-residents of the State may be served by publication. See also Sec. 5900, 5940, 5941. Question suggested in *Hicks v. Swift*, — Kan. —, 168 Pac. 904, but not decided, although the court in discussing the question could not see why it would be restricted to accidents occurring within the state.
- KENTUCKY:** *Section 8.* Employers who hire employees within this State to work in whole or in part without this State, may agree in writing with such employees to exempt from the operation of this act injuries received outside of this State; in the absence of such an agreement, the remedies provided by this act shall be exclusive as regards injuries received outside this State upon the same terms and conditions as if received within this State.
- LOUISIANA:** No provision.
- MAINE:** *Section 25.* Contract of hire made within the State for performance outside the State, is presumed to include agreement making compensation under this Act the exclusive remedy for injuries sustained.
- MARYLAND:** (*Sec. 63, (3, 12)*). Act does not apply to workmen employed wholly without the State, except as to mining employees who are injured while working in some part of the mine extending underground into an adjoining State, if the tippie, mouth or principal entrance of such mine is situated within the State.
- MASSACHUSETTS:** No extraterritorial application.
See *In re Gould*, 215 Mass. 408; *Cogliano v. Ferguson*, — Mass. —, 117 N. E. 45.
- MICHIGAN:** Amendment of 1921, Pt. III, § 19 gives extra-territorial application. *Crane v. Leonard, Crossett & Riley*, — Mich. —, 183 N. W. 204.
- MINNESOTA:** No provision; but see *State ex rel. Chambers v. District Court of Hennepin County*, 166 N. W. 185; *State ex rel. Maryland Casualty Co. v. District Court of Rice County*, 168 N. W. 177; *State ex rel. London, etc., Co. v. District Court of Hennepin County*, 170 N. W. 218; *Stansberry v. Stove Co.*, 183 N. W. 997.

MISSOURI: *Section 12b.* Act applies to injuries received outside the State under contracts of employment made in the State, unless the contract otherwise provides.

MONTANA: No provision.

NEBRASKA: No provision.

NEVADA: *Section 41.* Employee hired within the State whose duties are usually confined to the State, is entitled to compensation for injury received outside the State while engaged in employer's business.

NEW HAMPSHIRE: No provision.

NEW JERSEY: No provision in the act, but decisions hold that it applies to accidents suffered outside of the State. *Foley v. Home Rubber Co.*, 99 Atl. 624 (N. J.) 16 N. C. C. A. 886.

NEW MEXICO: No provision.

NEW YORK: No provision; but the courts have generally given extraterritorial effect to the Act, especially where the employee has been a resident of the State, or where the contract of employment was made in the State. *Edwardsen v. Jarvis Lighterage Co.*, 153 N. Y. S. 391; *Spratt v. Sweeney & Gray Co.*, Id. 505; *Affd.* 216 N. Y. 763; *Valentine v. Smith*, 168 App. Div. 403; *Affd.* 216 N. Y. 763; *Post v. Burger*, 163 A. D. 403; *Affd.* 216 N. Y. 544, 111 N. E. 351; *Klein v. Stoller*, 220 N. Y. mem; *Fitzpatrick v. Blacknall*, 220 N. Y. 671; *Gilbert v. Des Lauriers Column Mould Co.*, 167 N. Y. S. 274. But see, contra, *Gardener v. Horseheads Constr. Co.*, 156 N. Y. S. 899; *Jenkins v. Hogan & Sons, Inc.*, 163 N. Y. S. 707; *Holmes v. Communipaw Steel Co.*, 174 N. Y. S. 722; *Smith v. Heine Safety Boiler Co.*, 119 N. E. 878, 224 N. Y. 9, reversing 169 N. Y. S. 1114; *Thompson v. Foundation Co.*, 177 N. Y. S. 58; *State Ind. Comm. v. Barene*, Id. 689; *Perlis v. Lederer*, 178 N. Y. S. 449; *Baggs v. Standard Oil Co. of N. Y.*, 180 N. Y. S. 560.

NORTH DAKOTA: *Section 5, 10.* Compensation is payable for injuries covered wheresoever they have occurred.

OHIO: *Section 1465-68, 1465-69.* Act applies to injuries wheresoever they may occur.

OKLAHOMA: No provision.

OREGON: No provision.

PENNSYLVANIA: *Section 1.* Act does not apply to any accident occurring outside of the commonwealth, irrespective of the place where the contract of hiring was made.

PORTO RICO: No provision.

RHODE ISLAND: No provision. But construed to apply to accidents suffered outside of the state. *Grinnel v. Wilkinson*, — R. I. —, 98 Atl. 103.

SOUTH DAKOTA: *Section 9453.* Act applies to injuries sustained within the State or in another State or country.

TENNESSEE: *Section 19.* Act applies to injuries sustained outside the State, if contract of employment was made in the State and does not expressly otherwise provide.

TEXAS: *Pt. 1, Section 19.* Act applies to injuries received outside of the State, if employee was hired within the State.

UNITED STATES: No provision.

UTAH: *Section 3126.* Act applies to injuries received outside State if workman was hired in State and rights to compensation under law of another State are enforceable in Utah, if of such nature that they can be dealt with by Utah Commission and courts.

VERMONT: *Section 5774.* Injuries sustained outside the State covered, if contract of hiring was made within the State; if made outside the State, compensation may be awarded with reference to the law of the State in which the employee was hired (*Sections 5779, 5771*). Contracts of hiring within the State for performance outside the State are presumed to include agreement making compensation under the Act the exclusive remedy for injuries.

VIRGINIA: *Section 37.* Act applies to injuries sustained outside the State if contract of hire was made within the State; if employer's place of business is in the State; and if employee lives within the State; unless contract was for service exclusively outside the State.

WASHINGTON: No provision.

WEST VIRGINIA: *Section 9.* Act no longer applies to employee while employed without the State, except where his employment necessitates his temporary absence from the State, directly incidental to carrying on an industry in the State. (Formerly the Act did not apply to employees employed wholly without the State). It is newly provided that a mine shall be adjudicated within the State when the main opening, drift, shaft or slope is located wholly within the State.

WISCONSIN: No provision, but decisions hold it to have extraterritorial application. *Johnson v. Nelson*, 150 N. W. 620; *Anderson v. Miller Scrap Iron Co.*, 170 N. W. 275.

WYOMING: No provision.

CHAPTER IV.

HAZARDOUS EMPLOYMENT.

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HAZARDOUS EMPLOYMENT.

§ 48. **General Consideration.**—Some of the Compensation statutes apply only to hazardous or extra-hazardous industries, which are set out quite specifically in some, but more general in others. For an employee to be entitled to the benefits of such act, the facts must bring his employment within the terms of the statute of his state, which cannot be extended by the court, under the rule of liberal construction, beyond their plain import.¹

In New York it is unnecessary that the work of the particular employee be of hazardous nature, in order to bring him within the statute; it is sufficient if the work is incidental to the hazardous business of the employer. Thus, an employee working in the cost and payroll department, whose work was largely clerical, the business of the employer being hazardous, was entitled to compensation for injuries received when the chair on which she was sitting gave way and she fell to the floor.²

While the work of an employee may not be hazardous, he may still come within the act if his employment exposes him to the dangers of the industry which are hazardous; as, for example, where in going to and from work he is compelled to pass through a room in which power driven machinery is located.³

On the other hand, to come within the act, the work or occupation must subject the employee to the hazards contemplated by the law⁴ unless the act indicates an intention to include employees "in the service of an employer carrying on a hazardous employment" as now provided by amendment to the New York act.⁵

"The statute of (1913) does not undertake to specifically define or specifically describe every business occupation or enterprise that it classifies as extra hazardous, but it is clear that

no business should be held to be extrahazardous unless it is, in fact, extrahazardous per se, or is rendered extrahazardous when conducted under conditions and surroundings named in the statute."⁶

Under the New Hampshire Act, the work of the employee at the moment of injury, considered without reference to other work of his general employment, may not fall within the description of work contained in the act, but may still come within it owing to the nature of his general employment.⁷

The manifest intent of the Washington act is not to compensate for accidents generally, but to cover accidents occurring in hazardous employments.⁸

"Where the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on finding that he sustained injury while actually and momentarily doing work named in the statute. If the employer shows that the employee was not so engaged when he met with injury, he is not entitled to reimbursement under the statute, even though he at times did work embraced within the statute."⁹

1. *Lizotte v. Nashua Mfg. Co.*, 78 N. H. 357, 100 Atl. 757.

2. *Joyce v. Eastman Kodak Co.*, 182 App. Div. 354, 170 N. Y. Supp. 401, 16 N. C. C. A. 643; *Krinsky v. Ward & Gow*, 184 N. Y. S. 443, 7 W. C. L. J. 109, 1920.

3. *Peking Cooperage Co. v. Industrial Board*, 277 Ill. 53, 115 N. E. 128, 16 N. C. C. A. 636.

4. *Brown v. Richmond L. & R. Co.*, 173 App. Div. 432, 159 N. Y. Supp. 1047, 16 N. C. C. A. 637.

5. *Sprang v. Broadway Brewing & Malting Co.*, 182 App. Div. 473, 169 N. Y. Supp. 574, 16 N. C. C. A. 638.

6. *Hahenmann Hospital v. Industrial Board*, 282 Ill. 316; *Bowman Dairy Co. v. Industrial Comm.*, 292 Ill. 284.

7. *Pellerim v. International Cotton Mills*, 248 Fed. 242, 16 N. C. C. A. 633.

8. *Guerrieri v. Indus. Ins. Comm.*, 84 Wash., 266, 8 N. C. C. A. 440, 146 Pac. 608.

9. *Gleisner & Hubener*, — N. Y. App. Div. —, 155 N. Y. S. 946, 11 N. C. C. A. 328.

'Although the main purpose of conducting a farm was to further the interests of the employer's city business, which was a hazardous employment the court held that the employer not having elected to come under the act in regard to the occupation of farming, an employee engaged on the farm could not claim the benefits of the act, for farm laborers are not included within the act. "Any man employed to work on a farm, and to perform the work ordinarily done there, is a farm laborer. The statute does not classify the employee by the ordinary business of his employer, but by the kind of work he, himself, is employed to do."¹⁰

One engaged in improving the appearances of a farm for the purpose of effecting a sale is not engaged in farm labor and is entitled to an award for injuries received.¹¹

So a policeman is not within the act merely because the city is engaged in some occupations considered hazardous.¹²

Where the all around handy man of a city, whose duties include the care of the streets, street lamps, engine house, the water system, electric poles, and everything contained within the corporation, was injured when he caught a truck ride to the depot and intended to use the truck for hauling back some lead, it was held that the city was not engaged as a common carrier, nor was it engaged in a hazardous occupation.¹³

Under the Washington act if any portion of the employer's business is extrahazardous, his employees come within the act, and it is immaterial that his principal business is not hazardous.¹⁴

The Massachusetts act must be accepted as a whole as to all branches of one's business with respect to all those in the serv-

10. *Shafer v. Park Davis & Co.*, — Mich. —, 159 N. W. 304, 14 N. C. C. A. 1078.

11. *Odell v. Bowman*, 189 N. Y. App. Div. 386.

12. *Marshall v. City of Pekin*, 276 Ill. 187, 118 N. E. 497, 14 N. C. C. A. 1083.

13. *Spinks v. Village of Marcellus*, 180 N. Y. App. Div. 732, 168 N. Y. Supp. 69, 16 N. C. C. A. 670, 1 W. C. L. J. 689.

14. *Wendt v. Indus. Comm.*, 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790; *State v. Business Property Security Co.*, 87 Wash. 627, 152 Pac. 334, 11 N. C. C. A. 322.

ice under any contract of hire in that particular business. So where an employer operating nearly 100 shoe stores took out insurance on the same, stating that its business was located at "Farmingham Mass." and its business "boot and shoe manufacturers," insurance to be payable upon any person to whom compensation shall become due. An employee was injured in a retail store in Boston and the court in holding that he was under the Compensation Act said, "The workmen's compensation act does not permit an employer to become a subscriber as to one part of its business and to remain a nonsubscriber as to the rest of a business which is in substance and effect conducted as one business. It has been decided that insurance as to one class of employees of a farmer, engaged as drivers and helpers in the distribution and marketing of his produce, does not require insurance of farm laborers who are expressly exempted from the act. Keaney's case, 217 Mass. 5, 4 N. C. C. A. 556, 104 N. E. 438. We do not include within the scope of this decision transportation companies carrying on interstate commerce and in this regard wholly subject to the acts of congress (*Corbett v. Boston & M. R. R.*, 219 Mass. 351, 107 N. E. 60; *Northern Pac. Ry. v. Washington*, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160), but subject to state law as to intrastate business, not those conducting two wholly different and distinct kinds of business quite disconnected with each other in place, nature and management. Such cases, if and when they arise are to be considered on their own merits. We are dealing here with a case where one employer is conducting under single general administration the business of manufacturing, jobbing at the factory, and selling at retail in the factory and in stores. The circumstances that at the retail stores are sold other shoes and rubbers besides those manufactured at the factory, does not render the retail stores a business separate from the general business which is carried on as a unit made up of numerous parts."¹⁵

If any work the employee engages in is extra-hazardous it

15. *In re Cox*, 225 Mass. 220, 114 N. E. 281, 14 N. C. C. A. 1075.

is immaterial whether his usual employment is hazardous or not.¹⁶

§ 49. **Incidental Work in Hazardous Employments.**—Where an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed.¹⁷

The court in holding that an employee, who was injured while installing an engine, was engaged in work incidental to the hazardous business of operating a paper mill said: "This mill was a going concern; to run it to its full capacity, there was need of new machinery; and the installation of another engine was incidental to its continued operation. The men who were doing this work were not improving some building belonging to their employer, but unrelated to the business. They were furthering the business itself."¹⁸

A night watchmen was found dead at the bottom of a well while on duty about the building of a bakery which is designated as hazardous under Section 2, group 34 of the New York act. In holding that the dependents were entitled to compensation, the court said: "An employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed."¹⁹

16. *Replogle v. Seattle School District*, 84 Wash. 111, 11 N. C. C. A. 321, 141 Pac. 311.

17. *Larsen v. Painne*, 218 N. Y. 252, 112 N. E. 725.

18. *McNally v. Diamond Mills Paper Co.*, 223 N. Y. 83, 119 N. E. 242, 2 W. C. L. J. 110, Rev. 178 App. Div. 342, 164 Supp. 793.

19. *Fogarty v. National Biscuit Co.*, 221 N. Y. 20, 116 N. E. 346, 16 N. C. C. A. 639, Rev. 175 App. Div. 729.

A clerical worker, in the office of an employer who conducted a hazardous occupation, whose duties were caring for and sorting time cards, was engaged in work sufficiently incidental to the business of the employer to be entitled to compensation.²⁰

Although an employer engaged in storing fruits and produce is engaged in a hazardous business, a person employed by him as a traveling agent solely for the purpose of buying fruits, was not entitled to compensation for an injury received in an automobile accident while on a purchasing trip in a foreign state, as the work in which he was engaged had no connection with the storage business.²¹

Although an employer is conducting a hazardous employment, an employee whose duties, are to sweep out and mop the office and under no circumstance or at no time was he exposed to the hazards of the employment, therefore he was not an employee within the contemplation of the act and not entitled to compensation under the act.²²

The erection of a pulp carrier which was to be operated by mechanical power when completed, and for the purpose of conveying pulp to the employer's factory is not sufficiently incidental to the main hazardous occupation to come within the act. The court said: "If the plaintiff had been engaged in working in a place on or in connection with, or in proximity to machinery propelled or operated by steam or other mechanical power when the accident occurred, there would be no question as to the applicability of the statute. He would then have been working in a place on, in connection with, or in proximity to machinery propelled or operated by steam or other mechanical power. But, as there was no apparatus or machinery installed or in operation at the time and place of the accident, it cannot be said that he was so employed. * * * "The place where the pulp carrier

20. *Joyce v. Eastman Kodak Co.*, 182 App. Div. 354, 170 N. Y. S. 401, 16 N. C. C. A. 643.

21. *Sickles v. Ballston R. S. Co.*, 171 App. Div. 108, 156 N. Y. Supp. 864.

22. *Kehoe v. Consolidated Telegraph & Electrical Supply Co.*, 176 N. Y. App. Div. 84, 162 N. Y. S. 481, 16 N. C. C. A. 640.

was being erected was in no way appurtenant to the defendants' mills and in no sense a part of their manufacturing plant. To hold that building a pulp carrier for the defendants more than a mile from their mills in working in their mills within the meaning of the statute would lead to results never contemplated by the legislature. Under such an interpretation of the statute those engaged for the defendants in felling trees, hauling them from the forest many miles from their mills could be said to be working in their mills."²³

Under the California act which excludes from its operation "any person whose employment is both casual and not in the usual course of the business of the employer, it was held that a farm employee, who was injured while engaged in fighting a fire which threatened the ranch, was not engaged in the 'usual' course of his employment since it was not incident to the conduct of the business and was of a casual nature."²⁴

An employee engaged in working on a mill flume is within the act, where the operation of the mill is extra-hazardous.²⁵

Where an employee, engaged in a hazardous occupation went to a police station at the direction of his employer to ascertain if bail offered for a customer of the proprietor's adjoining saloon was acceptable and the employee while there was injured when pushed by a policeman, his injuries did not arise out of his employment.²⁶

Employees in the service of an employer, who is carrying on a hazardous work are included within the act. Therefore a bricklayer employed by a company, engaged in lithographing and printing, which is classified as a hazardous occupation, to point up one of the walls of the employer's plant is engaged in a work

23. *King v. Berlin Mills Co.*,—N. H.—99 Atl. 289, 14 N. C. C. A. 1081.

24. *London & L. Guar. & Acc. Co. of Canada v. Indus. Acc. Comm.* Cal., 161 Pac. 2, 14 N. C. C. A. 1085. *Maryland Casualty Co. v. Pillsbury* 172 Cal. 748, 158 Pac. 1031.

25. *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 5 N. C. C. A. 840, L. R. A. 1916 A. 10, Ann. Cas. 1914 D. 1280.

26. *Sabatelli v. DeRoberts* 183 N. Y. S. 796, (1920), 6 W. C. L. J. 573.

27. *Dose v. Moehle Lithographic Co.*, 221 N. Y. 401, 117 N. E. 616, 16

incidental to the business of the employer, and within the class embraced within the amendment of 1916, C. 622, Par. 2 of the New York act and entitled to compensation.²⁷

A gas company's office, in which clerical work is carried on by a woman clerk injured in operating a power driven machine for making plates for printing bills is a factory or workshop, although her principal duties are clerical.²⁸

But where a proprietor of a meat market conducted a fruit store in a separate building not adjoining the meat market, it was held not to be incidental to the meat business so as to entitle an employee to compensation for injuries while working in the store.²⁹

Employees of a blacksmith shop where there was no power driven machinery, but who in going to and from work were compelled to pass through a room where power driven machinery was located, were held to be engaged in a hazardous occupation. The court said: "In *Surburban Ice Co. v. Industrial Board*, 274 Ill. 630 (14 N. C. C. A. 1080n), 113 N. E. 979, we held that an employer who operated a plant for the manufacture of ice and engaged in the sale of ice, coal, coke, and wood and owned and used several teams for the delivery of the same was engaged in an extrahazardous enterprise under the workmen's compensation act, and that a teamster employed by such employer to deliver ice and coal, who was kicked by a horse in a barn where the horses were kept, was within the protection of the act. In *Chicago Dry Kiln Co. v. Industrial Board*, 276 Ill. 556 (14 N. C. C. A. 242n), 114 N. E. 1009, we held that a night watchman employed by a company engaged in drying lumber and operating a planing mill which was admittedly under the workman's compensation act, and who was injured as a result of an assault made upon him by a person who was attempting to enter a building owned by his employer in the night-time and while the mill was not in operation, was within the protection of the act. From these cases it must follow that Garls (applicant) was

N. C. C. A. 633, Rev'g. 179 App. Div. 519.

28. *Gowey v. Seattle Lighting Co.*,—Wash.—, (1919), 184 Pac. 339; 4 W. C. L. J. 752.

29. *Wood v. Papaw*, 184 N. Y. Supp. 686, 7 W. C. L. J. 113.

within the protection of the workmen's compensation act. The blacksmith shop in which he was employed was operated in connection with the remainder of the plaintiff in error's plant, and Garls was required, in going to the office to receive his pay, to pass through a room in which power-driven machinery was operated.³⁰

In construing the New Hampshire act with reference to the employments that are covered by it the court said: "But in order to be within the statute, the employment wherein the plaintiff was manually laboring when injured must not only be work in a mill, but also, work in connection with or proximity to any hoisting apparatus or machinery,' such as the statute describes. Moving the cupboard, if it is to be considered by itself, without regard to any work included within the plaintiff's general employment, is certainly not shown to have been work of that description. It had no connection with any machinery whatever, nor can we believe that it was 'in proximity to' any, in the statutory sense, even if such machinery was to be found in the building, to which the platform belonged. "If the plaintiff had been employed to do work such as never required him to enter this building, or any building belonging to the mill and containing such machinery, he would have not been entitled to the statutory remedy, according to *Lizotte v. Nashua Mfg. Co.*, 78 N. H. 357, 100 Atl. 757. This however, was not the case as has been stated. * * * Under his employment, the plaintiff might at any time be engaged in manual labor in connection with or in proximity to the machinery in the mill, and he frequently had been so engaged." Therefore, the court decided that plaintiff was protected by the act and entitled to compensation thereunder.³¹

Procuring men and supplies for the performance of work in a hazardous employment was held to be sufficiently incidental

30. *Pekin Cooperage Co., v. Indus. Board*, 277 Ill.; 53, 115 N. E. 128, 16 N. C. C. A. 636; *Chicago Dry Kiln Co., v. Indus Bd.*, 276 Ill. 556, 14 N. C. C. A. 242, 114 N. E. 1003, *Suburban Ice Co., v. Indus Bd.*, 274 Ill. 630, 113 N. E. 979, 14 N. C. C. A. 1080.

31. *Pellerim v. International Cotton Mills*, — C. C. A. —, 248 Fed. 242, 16 N. C. C. A. 633.

to the claimant's employment as a foreman to entitle him to compensation for injuries sustained there.³²

Under the same or a similiar state of facts as existed in the Lanigan case supra the court reversed an award in favor of a superintendent of highways for a town on the theory that he was an officer and not an employee.³³

Taking in danger signal lanterns is not incidental to bridge repairing.³⁴

§ 50. **Diversified Employment.**—A chauffeur, who was employed to drive his employer's pleasure car, and also a motor truck in delivering merchandise for the employer's department store, and who was injured while repairing the pleasure car, which was also used at times in connection with the department store, was not engaged in a hazardous employment, so as to bring him within the New York Act. "The employment of deceased was doubtless of a two-fold nature; he rendered certain services in connection with his employer's business; he also rendered other services disconnected with his employer's business; as a chauffeur operating the automobile truck in delivering merchandise he was engaged in a hazardous employment conducted by the employer for the pecuniary gain; as a chauffeur operating the touring car for the pleasure of his employer's family he was not engaged in a hazardous employment conducted for pecuniary gain. His status was similiar to that of a cook or butler in his employer's household."³⁵

While one in the employ of a fruit and produce storage company might have been entitled to compensation for an injury received while performing duties in connection with the stor-

32. *Lanigan v. Town of Saugerties*, 180 App. Div. 227, 167 N. Y. Supp. 654.

33. *Ten Broeck v. Town of Saugerties*, — N. Y. App. Div. —, 167 N. Y. 1130, 16, N. C. C. A. 639.

34. *Ruane v. New York*, 181 App. Div. 912.

35. *Winchester v. Morris*, 179 App. Div. 600, 166 N. Y. Supp. 873.
2 W. C. L. J. 859.

age business, which was hazardous, he was not within the act while on a trip to another state solely for the purpose of buying fruits.³⁶

Where an employee's work is of a dual nature and he was injured in the nonhazardous branch, he is not within the act.³⁷

In an Illinois case the court said: "It was not intended that employers engaged in an extrahazardous occupation, but carrying on an independent occupation not extrahazardous, should be subjected to a greater liability than other employers, engaged in an occupation not hazardous. The duties of Cannell (deceased) having no connection whatever with the extrahazardous business conducted by the district at Lockport, and the sanitary district not having elected to come under the provisions of the act, his administrator was not entitled to compensation."³⁸

Where an employee is employed by two different employers and is injured, the business of the employer for whom he was working at the time of the injury will determine whether or not he was engaged in extrahazardous work.³⁹

§ 51. **Away from Plant.**—Under an act making the workmen's compensation remedy exclusive for injuries sustained in the course of the employment away from the plant, or on the premises and at the plant, it was contended that a workman on a ship away from his employer's premises who was injured, while repairing an engine, through the negligence of one of the ship's employee's, could not maintain an action at law, the court overruling this contention said: "The complaint in this case is that the deceased was injured while making repairs on the steamship Hyades at Pier 9, Seattle, Wash., and away from the plant of the Standard Boiler Works. For the pur-

36. *Sickles v. Ballston R. S. Co.*, 171 App. Div. 108, 156 N. Y. Supp. 864.

37. *Kramer v. Indus. Acc. Comm*; 31 Cal. App. 673, 161 Pac. 278, 14 N. C. C. A. 1083; *Southern Pac. Co., v. Pillsbury* 170 Cal. 782, 151 N. Y. Supp. 946; *In re Sickler* 171 N. Y. App. Div. 108, 156 N. Y. Sup. 864.

38. *Sanitary District of Chicago v. Indus. Bd.* 282. Ill. 182, 118 N. E. 475, 16 N. C. C. A. 697, 1 W. C. L. J. 548.

39. *Bayer v. Bayer*, 191 Mich. 423, 158 N. W. 109, 16 N. C. C. A. 698.

pose of the demurrer this statement is admitted, and, if the fact is otherwise, it must be presented by answer. If the injury causing the death of Brown had been occasioned by reason of a defect in tools and apparatus furnished and necessary for the execution of the work in which he was employed, there might be reason for the contending that the 'plant' accompanied the employee to the place where the facilities of the enterprise were to be employed, and as between the employee and the employer the compensation act would be conclusive. But no reasonable construction, it seems to me, can be placed upon the language employed by the legislature and the general terms of the act, which determines that the 'plant' accompanies an employee wherever he may go to perform services for his employer, as against a third party."⁴⁰

§ 52. **Altering.**—The laying of a water main which constituted an addition to one already existing, was held to be an "altering," within the Wisconsin Labor Law regulating the work of erecting, altering, repairing, or painting of any house, building, structure, etc.⁴¹

§ 53. **Appliances.**—A moving picture machine is not an appliance within the meaning of section 2, of the New York Act, relating to the repair of electric machines and appliances, even though the picture machine was driven by an electric motor. A different question would be presented if the employee had been injured by the electric motor which operated the machine.⁴²

Where the act makes an employment hazardous, where such employment includes the guarding of appliances for the protection of the public, a school janitor, whose duties include the caring for a furnace boiler, is engaged in the "guarding of appliances for the protection of the public", (children in the schoolhouse) and automatically come within the protection of the compensation act.⁴³

40. *Martin v. Watson Nav. Co.*, 244 Fed. 976, 16 N. C. C. A. 696.

41. *Kosidowski v. Milwaukee*, 152 Wis. 225, 139 N. W. 187.

42. *Balcolm v. Ellintuch & Yarfitz*, 179 App. Div. 548.

43. *East St. Louis Board of Education v. Indus. Comm.* — Ill. — 1921,

§ 54. **Bottling.**—Taking half-barrels of beer from a basement is held to be incidental to the bottling business, and within the New York Act.⁴⁴

§ 55. **Brick Making.**—Repairing machinery used to make brick is held to be incidental to brick making and so within the New York Act.⁴⁵

§ 56. **Building Construction, Repair, etc.**—Paragraph (B) of section 3 of the Illinois Act brings within the act every employer engaged in the building, maintaining, repairing or demolishing of any structure. "The employer must be engaged in the occupation, enterprise or business, and therefore the building, maintaining or repairing of a dwelling house, which is neither the occupation, enterprise or business of the owner does not bring him within the Act, nor does the building of a shed or other similar structure by or for a farmer come within the terms of the statute or the legislative intent. The defendant in this case maintained a large building let out and used for income, part of it occupied as a lodge room, dance hall and offices in connection, and the maintaining of the building was the business or occupation of the defendant. Such occupation, enterprise or business is declared by clause 8 of paragraph (B) of section 3 to be extrahazardous. If the business of repairing such structure carried on by the Wixted Plumbing Company is extrahazardous, as it certainly is, the business of maintaining the structure and causing its repair was necessarily of the same character, and that being the occupation, enterprise and business of the defendant she was under the act."⁴⁶

An employer who in having rooms in his residence also-mined is not engaged in, "construction, repair, and demolishing of buildings for profit," which would bring such work within the enumerated class of hazardous employments.⁴⁷

131 N. E. 123.

44. King v. Gross & Co., 179 App. Div. 966.

45. Smith v. Washburn & Co., 183 App. Div. 911, 224 N. Y. 619.

46. Johnson v. Choate, 284 Ill. 214, 119 N. E. 972, 2 W. C. L. J. 458.

47. Hungerford v. Bonn, — App. Div. —, 171 N. Y. 280, 2 W. C. L. J. 682.

Construction of a building to be part of a shipbuilding plant, where the workman had to pass a galvanizing tank on the usual way to the toilet, was an extrahazardous occupation.⁴⁸

Under the Illinois act, which makes a person engaged in the business of erecting, altering, etc., of dwelling houses liable to the employees of a contractor unless the contractor has provided insurance, a retail grocer having a contractor to build a foundation under his dwelling house, disconnected from the store is not liable for injuries to the employees of the contractor since the grocer was not engaged in the business of altering dwelling houses.⁴⁹

An employee engaged to partition off a plant and do other carpenter work thereabout is not engaged in a hazardous occupation even though the employer's business of preparing macaroni is considered hazardous, for the repairing of the building was not the business which the employer was prosecuting for pecuniary gain.⁵⁰

The business of owning and operating a loft building is not one of the hazardous employments embraced within the terms of the Workman's Compensation Law. But, it will be noted that group 22 of the New York Workman's Compensation act was amended by L. 1916, C. 622, so as to include operation and repair of freight and passenger elevators as hazardous, and that group 42 was amended by L. 1917, C. 705, by adding "maintenance and care of buildings" as hazardous occupations.⁵¹

Where one's sole business was the managing, maintaining, and keeping in repair some 12 to 15 buildings, all except one or two

48. *Welden v. Skinner & Eddy Corporation*, — Wash. —, 174 Pac. 452 2 W. C. L. J. 859.

49. *Alabach v. Indus. Comm.*, — Ill. —, 1920, 126 N. E. 163, 5 W. C. L. J. 667.

50. *Bargey v. Massaro Marconi Co.*, 218 N. Y. 410, 113 N. E. 407, 16 N. C. C. A. 642. Affg. 170 N. Y. App. Div. 103, 11 N. C. C. A. 322, 155 N. Y. S. 560, 16 N. C. C. A. 644; *Geller v. Republic Novelty Works*, 180 App. Div. 762, 168 N. Y. S. 263, 16 N. C. C. A. 645.

51. *Chappelle v. Four-Hundred & Twelve Broadway Co.*, 218 N. Y. 632, 112 N. E. 569, 16 N. C. C. A. 668.

of which belonged to him, he was engaged in the business of maintaining buildings and subject to the Illinois Compensation Act.⁵²

The casual engagement of a carpenter by the hour to put shelves in a store does not make the proprietor engaged in structural carpentry.⁵³

A farmer employing help temporarily to make repairs on his dairy barn was not engaged in a hazardous employment enumerated in the New York Act as "structural carpentry," "roofing," and "construction and repair of buildings," as he was not engaged in that business for pecuniary gain.⁵⁴

The superintendent of an apartment building, who was injured while standing on a stepladder planing away a part of a door, which work was a part of his duties, was not engaged in hazardous employment or structural carpentry, or construction, repair, and demolition of buildings.⁵⁵

The operation of a school building is not extra hazardous under the Illinois Act.⁵⁶

§ 57. **Butcher Shop.**—The child labor law, the woman's ten hour law and city ordinance requiring butcher shops to take out licenses is not such legislation or regulation as would bring a retail grocery store and butcher shop, within the employment enumerated as hazardous by reason of section 3, cl. 8, of the Illinois Act, applying the act to persons engaged in enterprises in which statutory or municipal ordinance regulations, are imposed for the protection of employees.⁵⁷

§ 58. **Cannery.**—An employee of a canning factory, injured while gathering beans on land cultivated by the factory, was held to be within the New York Act.⁵⁸

52. *Storrs v. Indus. Comm.*, — Ill. —, 121 N. E. 267, 3 W. C. L. J. 238; *Johnson v. Choate*, 284 Ill. 214, 119 N. E. 972, 2 W. C. L. J. 458.

53. *Geller v. Republic Novelty Works*, 180 App. Div. 762, 168 N. Y. Supp. 263.

54. *Coleman v. Bartholomew*, 175 App. Div. 122, 161 N. Y. Supp. 560.

55. *Schmidt v. Berger*, 221 N. Y. 26, 116 N. E. 382.

56. *Compton v. Indus. Comm.* — Ill. —, (1919), 122 N. E. 872.

57. *Dietrich v. Indus. Bd.*, — Ill. —, 121 N. E. 226, 3 W. C. L. J. 248.

58. *Clarke v. Sherman*, 184 App. 921.

§ 59. **Carpenter Shop.**—An employer conducting a department store, a nonhazardous occupation, who had a carpenter shop upon one floor and employed carpenters regularly to work about the store, was conducting a hazardous occupation as far as the carpenters were concerned.⁶⁰

A carpenter engaged in repairing cars was engaged in a hazardous undertaking.⁶¹

§ 60. **Carriers—Carriages.**—Common Carriers by land are engaged in hazardous occupations so as to bring them within the provisions of the Illinois act of 1913.⁶²

A teamster hauling crushed stone for a teaming company which is engaged by another company to haul the stone for paving work, is employed in the occupation of carriage by land.⁶³

One engaged in pushing a handcart was not engaged as a carrier by land, within the meaning of the act.⁶⁴

The driver of a milk wagon is not engaged in "carriage by land," so as to bring him within the act; his duties not bringing him in connection with any extrahazardous feature of his employer's business.⁶⁵

The operation of vehicles to carry any person to funerals and burials conducted by an undertaker does not bring the business within the extrahazardous occupation of "carriage by land."⁶⁶

§ 61. **Hauling Incidental to Employers Business.**—The hauling of commodities as a mere incident to the business of the

60. *Alterman v. A. I. Mann & Son*, — App. Div. —, (1919), 179 N. Y. Supp. 584.

61. *Meyers v. La. Ry. & Nav. Co.*, — La. —, 74 So. 256, A. 1 W. C. L. J. 705.

62. *Chicago Rys. Co. v. Indus. Bd.* 276 Ill. 112, 114 N. E. 534, 16 N. C. C. A. 670.

63. *Parker-Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976, 14 N. C. C. A. 1079.

64. *Holtz v. Greenhut & Co.*, 175 App. Div. 878, 162 N. Y. S. 359, 16 N. C. C. A. 671.

65. *Bowman Dairy Co. v. Industrial Comm.*, 292 Ill. 284.

66. *Hochspeler v. Industrial Board*, 278 Ill. 523, 116 N. E. 121.

employer does not constitute the employer a carrier by land, within the meaning of the Illinois act.⁶⁷

So, where a corporation was engaged in supplying water to the inhabitants of a city, the hauling of water to customers in parts of the city not reached by the pipe lines, was a mere incident of its business, and did not constitute it a carrier by land.⁶⁸

An employer conducting a retail coal business who hires teamsters to make deliveries to his customers, was not a carrier by land. "The hauling and delivery of the coal were mere incidents of that business. Defendant in error was not hauling and delivering coal for anyone but himself, and was therefore not engaged in the business or enterprise of carriage by land as such dealer in coal. In such business he was neither a common carrier of persons or property nor a private carrier for hire. He was simply conducting his own business of a retail coal dealer, and the delivery of the coal or hauling of the same was not the business of the defendant in error, but a mere incident of it, as was also the hauling of the hay or feed or any other product that was necessary or convenient in the prosecution of his business."⁶⁹

" 'Carriage by land,' under subdivision 3 of paragraph (B), in the strict, literal meaning of the term might require that it include the hauling of grain by team and wagon from the farm to the elevator. Surely that was not within the legislative intention."⁷⁰

The Illinois Act as it now exists includes "the distribution of any commodity by horse-drawn or motor driven vehicle where the employer employs more than three employees in the enterprise or business, except as provided in sub-paragraph 8" of section 3.⁷¹

67. *Mattoon Water Co. v. Industrial Comm.*, 291 Ill. 487; *Fruit v. Industrial Board*, 248, Ill. 154; *Hochspeler v. Industrial Board*, 278 Ill. 523.

68. *Mattoon Water Co., v. Industrial Comm.*, 291 Ill. 487.

69. *Fruit v. Industrial Board*, 284 Ill. 154, 119 N. E. 931, 16 N. C. C. A. 686.

70. *Uphoff v. Industrial Board*, 271 Ill. 312, 318, 111 N. E. 128, L. R. A. 1916 E, 329, Ann. Cas. 1917 D, 1.

71. *Hurd's Rev. St. Ill.*, 1919, ch. 48, sec. 3.

§ 62. **Loading and Unloading.**—"The words 'loading and unloading,' in common use and understanding, apply as well to passengers as to freight and to street railways as well as to steam railways. Loading and unloading passengers on street railways is connected with the carriage of such passengers, and we have no doubt from the language of the act, persons engaged in such employment were intended to be embraced within its provisions."⁷²

§ 63. **Charitable Institution.**—A Charitable institution does not come within the Massachusetts Act.⁷³

§ 64. **Chauffeur Repairing Family Car.**—One injured in repairing a family car of an employer engaged in a hazardous occupation was held not to be engaged in work incidental to the hazardous occupation and not within the act.⁷⁴

§ 65. **Coal Business.**—Prior to the amendment of 1916, conducting a coal yard was not a hazardous occupation.⁷⁵

In November of 1916 coal yards were not listed as hazardous occupation in the New York Act, and one injured while unloading coal from a car to a wagon by coal falling upon him, could not bring himself within the act by claiming to be operating a wagon, when he was especially employed to shovel coal off the car and had nothing to do with the operation of the wagon.⁷⁶

One engaged in the retail coal business, is not engaged in an extrahazardous occupation bringing him within the act. Nor does it come within the classification of carriers by land, which of itself would make it an extra-hazardous employment. The hauling and delivery of coal was a mere incident of the employer's business. He was not engaged in the calling of common carrier

72. *Chicago Rys Co. v. Industrial Board*, 114 N. E. 534, 176 Ill. 112.

73. *Zoulalian v. New England Sanitorium*, 7 Benevolent Ass'n, — Mass. —, 119 N. E. 686, 2 W. C. L. J. 267.

74. *Wincheski v. Morris*, 179 N. Y. App. Div. 600, 166 N. Y. S. 873, 16 N. C. C. A. 681; *Kender v. Reineking*, — N. Y. App. Div. (1920), 126 N. E. 713, 5 W. C. L. J. 870.

75. *Casterline v. Gillen*, 182 App. Div. 105, 169 N. Y. S. 345, 16 N. C. C. A. 646.

76. *In re Hassan*, — App. Div. —, 172, N. Y. S. 430, 3 W. C. L. J. 181.

of persons or property nor a private carrier for hire, but was merely conducting his own private business.⁷⁷

§ 66. **Collector.**—A collector for an employer engaged in the manufacture of malt was, while in the performance of his duties as collector, shot and killed in a saloon away from the plant, the shooting being intentional and for the purpose of securing money which the deceased had collected. Affirming an award the court said: "Under subdivision 4 of section 3 of the Workmen's Compensation Law, as amended by chapter 622 of the Laws of 1916, Spang at the time of his death was within the protection of the act. That amendment was intended to include 'an employee in the service of an employer carrying on a hazardous employment, even though such employee is not actually engaged in a hazardous employment.' * * * *Dose v. Moehle Lithographic Co.*, 221 N. Y. 401, 117, N. E. 616, 16 N. C. C. A. 633. * * * And by the plain language of the statute it is immaterial whether the shooting of Spang occurred at the plant of the employer 'or in the course of his employment away from the plant.' He was clearly 'in the course of his employment' at the time of his injury." ⁷⁸

§ 67. **Commission Business.**—A commission business, conducting no warehouse in connection with its establishment other than its own store-room where it held its goods for sale and distribution, is not a hazardous occupation.⁷⁹

A wholesale produce commission merchant employing four or more men at his place of business comes within the act.⁸⁰

§ 68. **Construction.**—The term "construction," with reference to a building, means the putting together of the materials

77. *Eruit v. Indus. Bd.*, 284 Ill. 154, 119 N. E. 931; 16 N. C. C. A. 680.

78. *Spang v. Broadway Brwg. & Malting Co.*, 182 App. Div. 473, 169 N. Y. 574; 16 N. C. C. A. 637.

79. *State v. J. P. Powels & Co., Inc.* 94 Wash. 416, 162 Pac. 569, 16 N. C. C. A. 690; *Mihm v. Hussey*, — N. Y. App. Div. —, 155 N. Y. S. 860, 11 N. C. C. A. 328.

80. *State Indus. Comm. v. Voorhees*, — App. Div. —, (1920), 184 N. Y. S. 888, 7 W. C. L. J. 238,

used therein.⁸¹ The word "construct" is synonymous with "erect" as "construction" is with "erection."⁸²

"The words 'erection' and 'construction' seem to be synonymous in their meaning, and in common acceptance when applied to a house, they mean the building of it by putting together the necessary material and raising it."⁸³

It may include work of enlargement,⁸⁴ and extension.⁸⁵

The word may include maintenance and repair or alteration,⁸⁶ or it may not,⁸⁷ depending upon the manner in which it is used.

The phrase "the immediate doing of the work of construction," in a policy of insurance relating to telephone construction work, was held to include the work of trimming a tree while putting up a line.⁸⁸

§ 69. **Dairy.**—A dairy company engaged in distributing milk is not engaged in carriage by land within the meaning of the act so as to bring it within the enterprises enumerated as extrahazardous when it would not otherwise be within this class.⁸⁹

A superintendent of a dairy company's wholesale routes was injured when alighting from a street car, while enroute to reach a place where he was to give a new employee instructions in regard to his route. It was held that he was not at the time of

81. *Scharff v. Southern Illinois Const. Co.*, 115 Mo. App. 157, 92 S. W. 126.

82. *State ex rel. City of Chillicothe v. Gordon*, 233, Mo. 383, 135, S. W. 929; *Butz v. Murch Bros. Const. Co.*, 199 Mo. 279, 97 S. W. 895; *McNair v. Ostrander*, 1 Wash. 110.

83. *Burke v. Brown*, 10 Tex. Civ. App. 298.

84. *People v. Farmer's etc., Co.*, 52 Colo., 626, 123 Pac. 645.

85. *Graymount v. Stott*, 160 Ala. 570, 49 So. 683; *State ex rel. v. Miller*, 21 Okl. 448, 96 Pac. 747.

86. *Bell County v. Lightfoot*, 104 Tex. 346, 138 S. W. 381.

87. *Com. v. Hayden*, 211 Mass. 296, 97 N. E., 783; *State ex rel. v. Wilder*, 200 Mo. 97, 98 S. W. 465; *The O. H. Wessels*, 177 Fed. 589, *affd.*, 183 Fed. 561, 106 C. C. A. 107; *Hancock's Appeal*, 115 Pa. 1.

88. *Camden Atlantic Tel. Co. v. United States Casualty Co.*, 227 Pa. 242, 75 Atl. 1077.

89. *Bishop v. Bowman Dairy Co.*, 198 Ill. App. Div. 312, 16 N. C. C. A. 667.

the injury engaged in a hazardous employment or operating a wagon within the meaning of the New York Act.⁹⁰

§ 70. **Decorating.**—An employee was injured while hanging a picture which his employer had sold. This work was merely incidental to his regular employment and would not, therefore, come within the designated class of hazardous employments of "decorating" or "picture hanging."⁹¹

§ 71. **Dredging.**—Employees of a corporation engaged in dredging upon navigable waters, who are employed solely upon land are within the Washington Act.⁹²

§ 72. **Driver.**—An employee injured when putting away his horse at the end of a day's work of driving his truck in the usual course of a hazardous employment was held to be within the act.⁹³

A driver who was killed while driving a delivery wagon for a partnership engaged in selling gasoline, was sufficiently connected with the extrahazardous employment of the employer to entitle his widow to compensation under the Illinois act.⁹⁴

Where the driver of a motorbus was killed by falling therefrom, the death occurred while the deceased was engaged in the operation of an engine, and other forms of machinery which is hazardous within the meaning of the statute.⁹⁵

A teamster engaged in hauling rock for a construction company is within the act. The court said: "The enterprise cannot be considered a mere incident to the general business in which plaintiff in error was engaged. It was the business or enterprise itself. * * * If it was only the hauling of one load of crushed

90. *Balk v. Queen City Dairy Co.*, — App. Div. —, 172 N. Y. S. 471, 3 W. C. L. J. 177; *Glatzl v. Stumpp*, 220 N. Y. 71, 114 N. E. 1053.

91. *Grassell v. Broadhead*, 175 App. Div. 874, 162 N. Y. S. 42, 16 N. C. C. A. 684.

92. *Puget Sound Bridge and Dredging Company v. Indus. Ins. Comm.* — Wash. —, (1919) 177 Pac. 788, 3 W. C. L. J. 544.

93. *Smith v. Price*, — App. Div. —, 153 N. Y. S. 221, 9 N. C. C. A. 712.

94. *Gibson v. Indus. Bd.*, 276 Ill. 73, 114 N. E. 515, 16 N. C. C. A. 637.

95. *Haddad v. Commercial Motor Truck Co.*, (1920) —La.—, 84 So. 197, 6 W. C. L. J. 54.

stone by a farmer or business man who was not engaged in construction or contracting work generally, undoubtedly then the proper conclusion would be to hold the hauling of such single load a mere incident to the main business."⁹⁶

The Supreme court of Illinois in holding that a teamster was within the provisions of the act where the main business was hazardous, said: "Here the duties of the deceased required him to work in and around the plant where the ice was manufactured, and included the loading of ice, and the care of the horses in a large stable on the premises of plaintiff in error immediately adjacent to the main ice plant. We cannot see how it can fairly be held that the employment in which the deceased was engaged was not a part of plaintiff in error's business or occupation of manufacturing and selling ice * * *. The men in the buiding of plaintiff in error where the machinery was located and the ice manufactured were certainly within the act. The workmen around the building and caring for the property were within the act. Those whose duties took them to the plant to take away the product were within the act, and we can reach no other conclusion than that the duties of the deceased were of such a nature, so related to and connected with the occupation of plaintiff in error, under the provisions of the workmen's compensation act, shall be held liable for the injury."⁹⁷

One driving a wagon, for an employer, with his own team for delivering to customers of the company, cannot recover for injuries sustained in falling from the wagon. The court said: "Plaintiff in error contends that defendant in error comes within the terms of the Compensation Act because it was maintaining a structure within the meaning of the act, and because it was engaged in carriage by land, and because it was engaged in a business in which statutory and municipal ordinance regulations were imposed. We held in *Hochspeier v. Industrial*

96. *Parker Washington Co. v. Indus. Bd.*, 274 Ill. 498, 113 N. E. 976, 14 N. C. C. A. 1097.

97. *Suburban Ice Co. v. Indus. Bd.*, 274 Ill. 630, 113 N. E. 979, 14 N. C. C. A. 1080.

Board, 278 Ill. 523, 116 N. E. 121, L. R. A. 1918 F, 227 and in *Fruit v. Industrial Board*, 284 Ill. 154, 119 N. E. 913, that the hauling of commodities as a mere incident to the business of the employer does not constitute the employer a carrier by land within the meaning of the Workmen's Compensation act. We think our holding in those cases is decisive of the question here presented. The business or enterprise in which defendant in error was engaged and in which plaintiff in error was employed when he was injured was that of supplying water to the inhabitants of the city of Mattoon. The hauling and delivery of this water are mere incidents of that business. The fact that the defendant in error was maintaining a structure and, that it had machinery at its plant is not controlling here. Plaintiff in error was not at the time of his injury engaged in any part of the business of defendant in error that had to do with the maintenance or operation of the plant or pipe lines. Defendant in error had not elected to come under the act, and the injury sustained by plaintiff in error is not one arising out of or in the course of any employment declared by the act to be extrahazardous. Because some other employees of defendant in error may have been engaged in some other part of the work that was extrahazardous would not change the character of employment of plaintiff in error or bring him within the provisions of the act. This question was discussed at length and the conclusion reached in *Vaughn's Seed Store v. Simonini*, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B. 713, 288 Ill. 163, 124 N. E. 297. The record does not show that defendant in error is engaged in a business in which statutory or municipal regulations are imposed. Even if it was engaged in such business in the conduct and management of its water works plant, the injury did not arise out of or in the course of the employment of plaintiff in error in that business. In order to bring the employer under the act without election, it is necessary to show that the injury arose out of and in the course of employment in which such regulations are imposed. *Compton v. Industrial Com.*, 288 Ill. 41, 122 N. E. 872." 98

98. *Matton Clear Water Co. v. Indus. Comm.*, —Ill.— (1920), 126 N. E. 168, 5 W. C. L. J. 671.

Under the Washington act the operation of a truck is not a hazardous occupation.⁹⁹

§ 73. **Drug Store.**—The conducting of a drug store is not a hazardous occupation.¹

§ 74. **Elevators.**—The operation of ordinary freight and passengers elevators is not considered hazardous employment.²

Prior to the amendment of the New York act, an employee in an apartment house who was injured while bringing an elevator from the basement to the main floor was denied compensation.³

Repairing the doors of an elevator is incidental to its operation.⁴

§ 75. **Engineering—Lifting Radiator.**—An employee engaged as a general plumber and carpenter about an apartment house, who was injured when endeavoring to obtain a radiator from a storeroom for the purpose of installing it was held not to be engaged in a hazardous employment. The court in construing the New York act said: "Group 42 of section 2, as it existed in January, 1916 (Cons. Laws, c. 67; Laws 1914, c. 41) specified 'plumbing, sanitary or heating engineering, installation and covering of pipes or boilers.' The lifting of a radiator to connect it up for heating purposes was not heating engineering nor the installation and covering of pipes or boilers. That such work was not included within these terms is evident for the amendment

99. *Collins v. Terminal Transfer Co.*, 91 Wash. 463, 157 Pac. 1092; *Guerrieri v. Indus. Ins. Comm.*, 84 Wash. 266, 146 Pac. 608, 8 N. C. C. A. 440.

1. *Freess v. Kleinau*, — App. Div. —, (1919), 179 N. Y. Supp. 347, 5 W. C. L. J. 430.

2. *Guenieri v. Indus. Ins. Comm.*, 84 Wash. 266, 146 Pac. 608, 8 N. C. C. A. 440; *Page v. New York Realty Co.*, — Mont.—(1921), 196 Pac. 871.

3. *Sheridan v. P. J. Groll Const. Co.*, 218 N. Y. 633, 112 N. E. 568, Rev. 171 App. Div. 958, 155 N. Y. S. 859, 16 N. C. C. A. 669; *Wilson v. C. Dorflinger & Sons*, 218 N. Y. 84, 112 N. E. 567, 16 N. C. C. A. 670.

4. *Carey v. Frambo Realty Co.*, 183 App. Div. 910.

to the law passed subsequently and in the same year. Laws 1916 c. 622. Group 42 was amended so as to read 'plumbing' sanitary lighting or heating installation or repair;' and the word 'engineering' was dropped. So, too, group 22 was amended by the same act included 'heating and lighting.' The words 'maintenance and care of buildings' were not added to group 42 until 1917. Laws 1917, c. 705.⁵

§ 76. **Engineering Work.**—The word "work" is used in some of the acts in the sense of describing the active carrying on of a stated business or undertaking; as for instance; excavating work, engineering work, electrical work, etc. In this connection the definition of the word in the sense in which it is commonly used is of little or no value. As used in the acts in this manner it does not mean the labor bestowed, but the thing upon which the labor is bestowed. Engineering work, in which an employee was engaged, "was, therefore, a physical thing which embraced a certain physical area. If therefore, the injured workman was at the time of the accident employed on, in or about the physical thing, the engineering work, he came within the act."⁶

The work of constructing a street, using in that behalf a steam roller, is an engineering work.⁷

§ 77. **Engineering Works.**—The words "engineering works," as is used in the Oklahoma statute, refers to establishments or places of business where engineering work is carried on, and does not refer to work of an engineer on a public highway.⁸

The word "works" has been construed as meaning an establishment for manufacturing, or for performing industrial labor of any sort, and including the building, machinery, etc., used in required operation.⁹

5. *Krammer v. Hawk*, 221 N. Y. 378, 117 N. E. 576, 16 N. C. C. A. 677.

6. *Atkinson v. Lamb*, (1903) 1 KB 861, 88 LT 789, 72 L. Y. K. B. 469, 19 T. L. Rep 412.

7. *Lord v. Turner*, 114 L. T. Jour. 133, 5 W. C. C. 87.

8. *Board of Comr's v. Grimes*, — Okla., 182 Pac. 897.

9. *South St Joe Land Co. v. Pitt*, 114 Mo. 135,

An establishment for manufacturing or for performing industrial labors.¹⁰

It is said to have a definite signification, meaning a business of permanent character, as opposed to temporary employment, as used in the particular instance.¹¹

§ 78. **Ensilage Cutter.**—The operation of a feed mill or ensilage cutter is a hazardous occupation.¹²

§ 79. **Enterprise.**—“An enterprise is ‘an undertaking of hazard; an arduous attempt.’ Lexicographers define an enterprise as ‘an undertaking; something projected and attempted; an attempt or project, particularly an undertaking of some importance or one requiring boldness, energy or perseverance, an arduous or hazardous attempt, as, a warlike enterprise.’ The building of this shed might be classed under the head of something projected or attempted, but hardly as an important undertaking requiring courage or energy or one that was arduous or hazardous. To say that the word ‘enterprise’ covered the building of any structure, however small, would lead, in some instances, to absurd consequences. A chicken coop or a dog kennel ten feet square and four or five feet high would be a structure in a technical sense of the term, but it would hardly be contended that such a structure was within the meaning of this act, according to the intent of the legislature. It is plain from the use of the word ‘enterprise’ in other subdivisions of said paragraph (B) that it was intended to mean a work of some importance that might properly be considered arduous or hazardous. The building of this sort of a structure was hardly more hazardous than the building of an ordinary board fence for a farm. From any fair construction of the act the legislature never intended to call working on every farm structure, no matter how small, as extra-hazardous.”¹³

10. *Conroy v. Clinton*, 158 Mass. 318, 33 N. E. 525.

11. *In re Pardee's Appeal*, 100 Pa. 408.

12. *Raney v. Indus. Comm.*, 85 Ore. 199, 166 Pac. 523, 16 N. C. C. A. 675.

13. *Uphoff v. Industrial Board*, 271 Ill. 312, 111 N. E. 328, L. R. A. 1910 E 329, Ann. Cas. 1917 D 1.

A university is not engaged in an "enterprise," within the Illinois Act, although it uses and handles explosives, inflammable fluids and molten metals in the course of its instructions.¹⁴

§ 80. **Erection.**—One of the primary definitions of the word "erect" is "to raise" as a building; to build, to construct.¹⁵

"Erect" means to raise and set up in an upright or perpendicular position; to raise, as a building; built or constructed; and, in defining a house as a building erected for public or private use, "erected" applies to any erection, as the construction of a tent of poles and canvas for private use, and makes it a house.¹⁶

The word "erection," used with reference to building, means the putting together of the materials that are used therein, the putting together of the brick and mortar, wood and other materials making the construction.¹⁷

A statute of Wisconsin, known as the Labor Law, provides that a person employing another in labor of any kind in erecting, repairing, altering, or painting of a house, building, or structure shall not furnish for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, etc. It was held that the laying of a water main was "erecting a structure," within the meaning of the law.¹⁸

Within the meaning of a statute providing that every theatre hereafter erected shall be built to comply with the regulations prescribed therein, it was held that the word "erected," as so used was synonymous with "built," and that the statute, therefore, applied to the alteration of a stable into a theatre, consisting of a large part of the stable, and using only such parts of the walls, etc., as were suitable for the new construction.¹⁹

14. *North v. Board of Trustees*, 201 Ill. App. 449.

15. *Butz v. Murch Bros. Const. Co.*, 199 Mo. 297, 97 S. W. 895; *Eichleey v. Wilson*, 42 Wkly. Notes Cas. (Pa.) 525, 527.

16. *Favro v. State*, 39 Tex. Cr. Rep. 452, 46 S. W. 932, 73 Ann. St. Rep. 950.

17. *Scharff v. Southern Illinois Const. Co.*, 115 Mo. App. 157,

18. *Kosidowski v. Milwaukee*, 152 Wis. 223, 139 N. W. 187.

19. *Greenough v. Allen Theatre & Realty Co.*, 33 R. I. 120, 80 Atl. 260.

“ ‘And have erected a regular station’ means more than the erection of a station house. The word ‘erect’ may mean ‘to build’ or it may mean ‘to set up’ or ‘found’ or ‘establish’ or ‘institute,’ according to the context ”²⁰

“Erection” includes additions to a building,²¹ as the construction of an additional story,²² or the addition of wings,²³ or a kitchen.²⁴

“A construction cannot be given to the laws conferring power to levy taxes for the ‘erection of public buildings,’ which would limit the exercise of the power to the erection of new houses, when the object of the law could often be attained by erecting, at less expense, additions to public houses already built.”²⁵

However, it has been held that every change, alteration, or addition in or to an existing structure does not constitute an “erection” or construction of a building, within the meaning of a statute giving mechanics’ liens. The change or alteration, it was declared, must be such that the whole structure, as changed or altered, would commonly be regarded as another new and different building; and the addition of a back building to a main structure as, for instance a bathhouse and kitchen to a residence—is not an erection or construction of a building.²⁶

The addition of a basement to a frame house was held not to be an erection, within the meaning of a mechanic’s lien law.²⁷

While the Pennsylvania cases hold that the word “erection” as used in the mechanic’s lien laws, does not include repair, alteration, or addition, to houses or buildings already construct-

20. *Port Huron & N. W. R. Co. v. Richards*, 90 Mich. 577, 51 N. W. 680.

21. *Brown v. Graham*, 58 Tex. 254.

22. *Carral v. Lynchburg*, 84 Va. 803, 6 S. E. 133; *Driesbach v. Keller*, 2 Pa. (2 Barr) 77.

23. *Harman v. Cummings*, 43 Pa. (7 Wright) 322; *Nelson v. Campbell*, 28 Pa. (4 Casey) 156.

24. *Dellone v. Long Branch Comr's*, 55 N. J. L. 108, 25 Atl. 274.

25. *Brown v. Graham*, 58 Tex. 254.

26. *Rand v. Mann*, (Pa.) 3 Phila. 429.

27. *Miller v. Oliver*, 8 Watts (Pa.) 514.

ed,²⁸ where a building of brick and frame, was removed, and after its removal a cellar was dug under it and walled up, and a new chimney built, and the house newly weather-boarded and plastered, it was held to be a building "erected."²⁹

"Erected," as used in reference to a building, has been held to be synonymous with "completed."³⁰

A building "erected" is quite distinct from a building "being erected." To erect, when used in connection with a house, or church, or factory, is to build; and neither can be said to be erected, until they are built, completed.

On the other hand, where a party, in subscribing for the erection of a building for a university, agreed, that if a building should be erected within a given time worth a stipulated amount, he would give \$400, it was held that it was not essential that the building should be completed within the time in order that the subscription should be payable; that there is a great difference between erecting a building and completing one, and that a building may be said to be erected when the walls are up and the material on the ground to complete it.³²

While the word "erection" has a definite meaning in so far as defining it is concerned, it will be observed from the cases referred to that its meaning in any particular instance depends to an extent upon the context and purpose of the law or instrument making use of it.

§ 81. **Excavating.**—"The word 'excavating,' under subdivision 2, of paragraph (B), might cover, technically, the digging of a post-hole on a farm, but it was certainly never so intended."³³

Digging of trenches by hand in making private connections to

28. Appeal of Hancock, 115 Pa. 1, 7 Atl. 773; Appeal of Wetmore, 91 Pa. 276; Rynd v. Bakewell, 87 Pa. 460.

29. In re Burling's Estate, 1 Ashm. (Pa.) 377.

30. Hartrath v. Holsman, 127 Ill. App. 560.

31. McGary v. People, 45 N. Y. 153.

32. Johnston v. Ewing Female University, 35 Ill. 518.

33. Uphoff v. Industrial Board, 271 Ill. 312, 318, 111 N. E. 328, L. R. A. 1916 E 329, Ann. Cas. 1917 D. 1.

a sewer is an extrahazardous occupation, within the meaning of a statute, which makes excavating extrahazardous.³⁴

§ 82. **Explosives, etc.**—The business of selling and delivering gasoline is extrahazardous, and it is immaterial that the injury to an employee was not due to the explosive character of the product handled in determining whether or not he was within the protection of the Compensation Act. Thus, where an employee fell from the seat of an empty gasoline wagon while returning from making a delivery, he was within the act.³⁵

A shooting gallery is not within a statutory provision relating to the manufacture, storing or handling of explosives, gun powder or ammunition.³⁶

The use of dynamite in dangerous quantity for blowing up stumps in making a road, which can be done in a few hours time, and which is seldom necessary in such work, is a casual employment; and a teamster employed to plow and grade the road, and who is injured while assisting in the dynamiting, cannot recover under the Compensation Act.³⁷

The use of explosives, such as inflammable fluids and molten metal, by a university in the course of giving instruction, is not within the Illinois Act.³⁸

§ 83. **Factory.**—Under a statute defining factory as “a place where power is used in manufacturing,” the Kansas court held that a place where barrels were made, without the use of any power other than hand power, was not a factory.³⁹

A night engineer in a piano factory is employed in a hazardous occupation.⁴⁰

34. *Scully v. Indus. Comm.*, 284 Ill. 567, 120 N. E. 492, 3 W. C. L. J. 30.

35. *Gibson v. Industrial Board*, 276 Ill. 73.

36. *Langner v. McGrath*, 187 App. Div. 911.

37. *McLaughlin v. Industrial Board*, 281 Ill. 100.

38. *North v. Board of Trustees*, 201 Ill. App. 449.

39. *Menke v. Hauber*, 99 Kan. 171, 160 Pac. 1017, 16 N. C. C. A. 692.

40. *Nulle v. Hardman, Peck & Co.*, —N. Y.—, 173 N. Y. S. 236, 3 W. C. L. J. 343.

§ 84 **Farming.**—Farming is not a hazardous occupation.⁴¹

§ 85. **Florists.**—Where a florist undertakes to deliver flowers using an automobile for that purpose he thereby brings his business within the class of enumerated hazardous employments⁴²

§ 86. **Garbage Disposal Plant.**—The fact that refuse may contain material value for fertilizing purposes does not make the dump a garbage disposal plant within the meaning of the act, and an employee, engaged in searching for rags among the rubbish, is not employed in the manufacture of fertilizers nor upon a garbage disposal plant connected therewith.⁴³

§ 87. **Garbage Removal.**—The principal business of the employer being garbage removal, an employee whose sole work is sorting on the dump, is within the act.⁴⁴

§ 88. **Groceries, Wholesale.**—“Wholesale groceries” includes the sale of groceries in bulk to grocery stores and restaurants by one who conducts a retail store in connection with such business.⁴⁵

§ 89. **Heating.**—The mere incidental heating of a saloon by a self regulating boiler does not come within the New York provision relating to heating.⁴⁶

§ 90. **Hoisting Apparatus—Hand Elevator.**—Where it was shown that the room wherein deceased was employed contained a movable elevator for raising and lowering heavy cases which

41. *Seggebruch v. Indus. Comm.*, — Ill. —, (1919), 123 N. E. 176, 4 W. C. L. J. 156.

42. *Glatzl v. Stumpp*, 220 N. Y. 71, 114 N. E. 1053, 16 N. C. C. A. 645; *Rev. g.* 174 App. Div. 901, 159 Supp. 1115.

43. *Guiseppi Tomassi v. Harold B. Christensen Jr.*, 156 N. Y. S. 905, 171 N. Y. App. Div. 284.

44. *Sacalli v. Marrone*, 2 N. Y. Bul. 19, 12 S. D. R. 543.

45. *Jurgreau v. Scherzer*, 185 App. Div. 920.

46. *Hermann v. Wolff*, 4 N. Y. Bul. 88, D. R. 609.

elevator was operated by hand power, while the room adjacent contained power driven elevators upon which the deceased and other employees rode while in the performance of their work, the court in granting a new trial said: Little doubt can be entertained that the hand elevator is a 'hoisting apparatus' within the meaning of the statute, and that the stamping machine and the power driven elevators are also included in the statutory language. The fact that the stamping machine had not been operated for the 3, weeks before the accident, on account of the strike, did not remove it from the class of machine whose operation involved more or less danger to the employee in the immediate vicinity. It was liable to be put in motion at any time. Its operation was not permanently discontinued. The applicability of the statute to a particular machine does not depend upon its continuous operation while employees are at work. The liability to be put in motion at any time renders it a dangerous instrumentality installed by the manufacturer for the use in his mill or factory." The court observed, further, that an employee was within the protection of the statute, "because his employment at times brought him in proximity to dangerous machinery, though at the time of the accident he may not have been in such proximity."⁴⁷

§ 91. **Hospital.**—"The mere conducting of a hospital for treating injured and sick persons, as contented by the appellee, is not, of itself, extrahazardous, yet a hospital is named in the statute as one of the enterprise which may become extrahazardous when it is conducted in a building of such height (seven stories) and in a city where municipal ordinance regulations are or shall be imposed "for the regulating, guarding, use or the placing of machinery or safeguarding of the employees or the public therein." It cannot be truly said that conducting a hospital in a populous city like Chicago, in a seven-story building and under the ordinance regulations, such as are imposed on appellee, cannot be extrahazardous, or even hazardous. if conducted in a one-

47. *Morin v. Nashua Mfg.Co.*, —N. H.—, 103 Atl. 312, 16 N. C. C. A. 694 This case upon a former hearing was entitled, *Lizotte v. Nashua Mfg. Co.*, — N. H. —, 100 Atl. 757, 16 N. C. C. A. 693.

story building without such regulations and without being surrounded by dangerous machinery, equipment, and appliance, to prevent serious accidents, made serviceable or driven by electricity or some other extraordinary dangerous agency. * * *

“Under the evidence in this case we think it clearly appears that the hospital of appellee—i. e., the business or enterprise of conducting a hospital by it in the building with the machinery appliances, and equipment therein used, —is, in fact, extrahazardous within the meaning of the statute. Many of its employees are engaged in handling, repairing, and operating dangerous machinery, equipment, and appliances, and are exposed to the dangerous agency or power which drives or makes serviceable such equipment and appliances. Not only are those employees exposed to such dangers, but all other employees therein are more or less exposed to them. Extraordinary care and skill are required in handling and management of said equipment and appliances to prevent serious accidents.”⁴⁸

§ 92. **Hotel.**—To come within the provisions of “hotels having fifty or more rooms,” as used in the New York Act, it is not essential that the fifty rooms be contained in one building; they may be scattered under separate roofs.⁴⁹

§ 93. **Ice Harvesting.**—Harvesting ice for farm use is not within the designation of “ice harvesting.”⁵⁰

§ 94. **Installation of Water Tank.**—The installation of water tanks does not come within the enumerated classes of hazardous employments nor can it be considered, to come within the provision covering the installation of boilers, engines or heavy machinery.⁵¹

48. *Hahnemann Hospital v. Indus. Bd. of Ill.* 282 Ill. 316, 118 N. E. 767 (1918), 16 N. C. C. A. 666, 1 W. C. L. J. 754, revg. 205 Ill. App. 478.

49. *Mosher v. Luther*, 190 App. Div. 963; *Flannery v. Gobel*, 17 D. R. 586, 3 Bul. (N. Y.) 220.

50. *Mullen v. Little*, 186 App. Div. 169.

51. *Maloney v. Levy & Gilliland Co.*, 176 App. Div. 470, 163 N. Y. S. 505, 16 N. C. C. A. 674.

§ 95. **Junk Business.**—The operation of a junk yard, where power driven shears and acetylene torch are used is a hazardous employment.⁵²

Breaking up a wheel may be incidental to the junk business.⁵³
Buying second-hand bottles is not dealing in junk.⁵⁴

§ 96. **Logging.**—A farm hand, hauling a load of logs, cut from his employer's farm, to mill, was not within the provision of the New York Act relating to logging. "While plaintiff, the employee, would be included within the general language of subdivision 4, of section 3, as engaged, in a hazardous occupation, still it is expressly provided in subdivision 4, of section 3, of the act, that the term 'employee' shall not include farm laborers or domestic servants, so that even if a farm laborer is engaged in logging, he is specifically excepted from the provisions of the act. Defendant and two or three men were getting out logs on his farm; and, merely because he was going to sell the lumber did not, we think, take it out of what is generally understood to be farm labor."⁵⁵

§ 97. **Longshore.**—The fact that a city dump was located near the shore does not make a ragpicker injured while at work in the dump, a longshoreman within the meaning of the act.⁵⁶

One injured while unloading stoves is not engaged in a hazardous occupation nor does he fall within the class of employee scheduled in the New York Act as longshore. The court said: "It is clear that the plaintiff was not engaged in longshore work, nor in the handling of cargoes nor was he then engaged in the handling of the same in any warehouse or other place of storage. It is clear from a reading of the section that it was the intention of

52 *Cinofsky v. Indus. Comm.*, — Ill. —, (1919), 125 N. E. 286, 5 W. C. L. J. 185.

53. *Levine v. Gould's Sons*, (N. Y.) 14 S. D. R. 619, 3 Bul. 78.

54. *Kronberger v. Harlem Bottle Co.*, 181 App. Div. 900.

55 *Brockett v. Mletz*, 184 App. Div. 342.

56. *Tomassi v. Christensen*, 171 App. Div. 284, 156 N. Y. S. 905, 16 N. C. C. A. 678.

the legislature to cover such cases as might arise in the removal of cargoes from ships and docks to warehouses, especially carried on for hire.⁵⁷

Nor is one employed as watchman over cargoes engaged in the work of a longshoreman.⁵⁸

§ 98. **Maintain.**—The word “Maintain” has been held to mean to support that which has already been brought into existence;⁵⁹ to hold or keep in a particular state or condition, especially in a state of efficiency; to support, sustain, not to suffer to decline.⁶⁰ The word may be used in the sense of having control and custody of a place,⁶¹ and has been construed to include the erection of a fence,⁶² and the operation of an elevator.⁶³ It is frequently used as meaning to keep in repair;⁶⁴ but what repairs are included depends upon the context of the instrument in which it is used.⁶⁵ It has been held to include the rebuilding of a bridge washed away by an extraordinary freshet.⁶⁶ Cleaning streets is repairing or maintaining them, within a law authorizing designated officials to construct, repair and maintain highways.⁶⁷ The

57. *Gutheil v. Consolidated Gas Co.*, 94 N. Y. Misc. 690, 158 N. Y. S. 622, 16 N. C. C. A. 677.

58. *Oberg v. J. C. McRoberts & Co.*, 175 App. Div. 1, 161 N. Y. S. 934, 16 N. C. C. A. 679.

59. *Kendrick & Roberts v. Warren Bros.*, 110 Md. 47, 72 Atl. 461; *Coleman v. Mississippi & Rum River Boom Co.*, 114 Minn. 443, 131 N. W. 641, 35 L. R. A. (N. S.) 1109; *Hoar v. Hennessy*, 29 Mont. 253, 74 Pac. 452.

60. *Kovachoff v. St. Johns Lbr. Co.*, 61 Oreg. 174, 121 Pac. 801.

61. *State v. Ross*, 86 Kan. 799, 121 Pac. 908.

62. *Hoar v. Hennessy*, 29 Mont. 253, 74 Pac. 452.

63. *Globe Ins. Co. v. Wayne*, 75 Ohio St. 451, 80 N. E. 13.

64. *Ferguson v. Rochford*, 84 Conn. 202, 79 Atl. 177, Ann. Cas. 1912 B. 1212; *Green River Asphalt Co. v. St. Louis*, 188 Mo. 576, 87 S. W. 985; *Missouri, K. & T. R. Co. v. Bryan*,—Tex.—, 107 S. W. 572, citing *Verdin v. St. Louis*, —Mo.—, 27 S. W. 447. ,

65. *Green River Asphalt Co. v. St. Louis*, 188 Mo. 576, 87 S. W. 985.

66. *Louisville & N. R. Co., v. United States Iron Co.*, 118 Tenn. 194, 101 S. W. 414.

67. *Connor v. Manchester*, 73 N. H. 233, 60 Atl. 436.

same is true of such work within the Illinois Compensation Act.⁶⁸ "The first and primary definition given to the word 'maintain' both in Webster's Unabridged Dictionary, and in Webster's International Dictionary, is, 'to hold, or keep in any particular state or condition.' * * * The word 'operate' does not mean the same thing as either the word 'construct,' the word 'maintain,' or the expression 'keep in repair,' and is not included in the significations of either.'⁶⁹

"The business of washing windows, as such, in large cities is as much a part of the maintenance of buildings as would be the replacing of glass in windows, the painting and decorating of the buildings, or the repointing of the outside where the mortar between bricks was giving way.'⁷⁰

§ 99. **Manhole Construction.**—Constructing a manhole in the city streets is not a hazardous occupation.⁷¹

§ 100. **Manufacture.**—"Manufacture" does not include mere wholesale dealing. Consequently, a dealer in dress trimmings does not come within a provision relating to the manufacture of such articles.⁷² The making of hats and feathers in a millinery business is a hazardous employment.⁷³

Machinery salesman required to inspect machinery in operation, is employed in the "Manufacturing" of machinery, a hazardous employment.⁷⁴ The manufacture of stock tonics is held to be manufacture of cattle food, within the New York Act.⁷⁵ Prior to the amendment of the New York Act to include the manufac-

68. *Rock Island v. Industrial Board*, 287 Ill. 76.

69. *McChesney v. Hyde Park*, 151 Ill., 634, 646.

70. *Chicago Cleaning Co. v. Industrial Board*, 283 Ill. 177, 181, 118 N. E. 989, 16 N. C. C. A. 683.

71. *Puget Sound Traction Light & Power Co. v. Schleif*, (C. C. A.) 226 Fed. 48, 9 N. C. C. A. 715.

72. *Kass v. Herschberg, Schultz & Co.*, 191 App. Div. 300.

73. *Saenger v. Locks*, N. Y. —, 116 N. E. 367, B. I. W. C. L. J. 1208.

74. *Benton v. Fraser*, N. Y. —, 114 N. E. 43, B. I. W. C. L. J. 1176.

75. *Markham v. United Breeders Co.*, 4 S. D. R. 390, 175 App. Div. 957.

ture of dairy products, the court denied compensation for the death of an employee of a grocery company resulting from blood poison caused by an injury to his hand while packing butter in tubs.⁷⁶

A general utility man, who was killed while building a shelf in a wholesale drug establishment, was within the provision of the New York Act relating to the manufacture of drugs and chemicals.⁷⁷ An employee of a retail druggist injured while making glycerite of tannin, a simple process of heating glycerine and stirring in tannin, was not engaged in the manufacture of drugs, within the New York Act.⁷⁸

A chef in a hotel, injured while cutting up meat for distribution, was held not to be engaged in a hazardous occupation, since the preparation of food stuff as used in Section 2, of the act did not mean the ordinary preparation of meat or food-stuff for cooking purposes, but involved a preparation which either changed the form of the material to render it suitable for use, or changed the nature of the material for the same purpose.⁷⁹

The commission is justified in awarding compensation to an employee who was injured while handling plate glass, which comes within the statutory enumeration of hazardous employments, on mere proof that he was injured in such occupation. The burden of showing that at the time claimant was engaged in merely packing glass which had been sold to a customer, and which is an ordinary occupation rested upon the employer, and in the absence of such proof the award will be upheld.⁸⁰ The word "moulding," as used in the New York act relating to manufacture of mouldings, etc., does not include the fastening of mouldings for picture hanging.⁸¹ The manufacture of moving

76. *Pardy v. Boomhower Grocery Co.*, 178 App. Div. 347.

77. *Larsen v. Paine Drug Co.*, 169 App. Div. 838, 218 N. Y. 252.

78. *Frees v. Kleinau*, 190 App. Div. 131.

79. *De La Gardelle v. Hampton Co.*, 167 App. Div. 617, 153 N. Y. S. 162, 9 N. C. C. A. 703. In this connection, notice should be directed to the amendment of group 34 of the New York Act, by Laws 1917, ch. 705, to include, "hotels having fifty or more rooms."

80. *McQueeney v. Stuphens & Hyer*, 167 N. Y. App. Div. 528.

81. *Grassell v. Broadhead*, 175 App. Div. 874, 162 N. Y. Supp. 421.

picture films includes alteration and repair incidental to their distribution;⁸² but does not include the taking of a moving picture.⁸³

The manufacture of trunks includes repair of trunks in retail stores belonging to the manufacturer.⁸⁴ Likewise, manufacture of shoes is held to cover the repair of shoes in shoe repair shops.⁸⁵

§ 101. **Mason or Concrete Work.**—One engaged in digging under a wall for the purpose of building a pier is not engaged in mason or concrete work so as to bring him within the New York Act.⁸⁶ An excavation for the purpose of erecting a pillar to strengthen an existing building is incidental to the "concrete work," within the provisions of the act relating to hazardous employment, so as to include an injury to a workman while making the excavation.⁸⁷

§ 102. **Meat Market.**—Prior to the amendment 1916, conducting a meat market was not considered a hazardous occupation under the New York Act.⁸⁸

§ 103. **Minor.**—The engagement of a minor to work at a hazardous employment in violation of the statute will render the compensation act inapplicable in so far as the child is concerned.⁸⁹

82. *McDowell v. New Film Corp.*, 183 App. Div. 910.

83. *Michel v. American Cinema Corp.*, 182 N. Y. Supp. 588, 6 W. C. L. J. 375.

84. *Caplan v. Belber Trunk & Bag Co.*, 4 N. Y., Bul. 54, 18 S. D. R. 563.

85. *Santello v. Bell Bros.*, 188 App. Div. 946.

86. *Morris v. Muldoon*, —App. Div. — (1919), 177 N. Y. S. 673, 4 W. C. L. J. 623.

87. *Morris v. Muldoon*, — App. Div. — (1920) 180 N. Y. S. 319, 5 W. C. L. J. 570.

88. *Pletha v. Murdter*, 174 N. Y. App. Div. 764, 161 N. Y. Supp. 661, 16 N. C. C. A. 640.

89. *Kruezkowski v. Polonia Pub. Co.*, 203 Mich. 213, 168 N. W. 932, 17 N. C. C. A. 611; *Waterman Lumber Co. v. Beatty*, —Tex. Civ. App.—, 204 S. W. 448, 17 N. C. C. A. 614. See section, 14, ante, Minors.

In New York it is held that a child, injured while operating an elevator in violation of the Labor Law, must seek redress solely under the Compensation Act.⁹⁰

§ 104. **Moving Picture.**—(See Manufacture.) The operation of a moving picture machine is not work in connection with “electric power lines, dynamos or appliances” so as to make it a hazardous employment. The court said: “The word is used in Section 2, Group 12, of the New York Act, in connection with the repair or operation of electric light and electric power lines, dynamos and power transmission lines. Plainly the application of the rule of ejusdem generis precludes the construction claimed by the respondent. The word ‘appliances’ must be considered as limited by the words with which it is associated. * * * The motor which applied the current to the moving picture machine might properly be called an appliance with the meaning of group 12, and had the claimant been injured while operating the motor a very different question would be presented. It can hardly be said, however, that the machine to which the electricity was applied, simply resulting in the machine being put in motion, was an appliance within group 12. The operation of the machine by electricity or the presence of electricity had nothing to do with causing the injury to claimant. The injury would have been sustained had the machine been operated by means of water or any other motive power. The only connection between the electric power and claimant’s injury was that electric power operated the machine upon coming in contact with which the claimant was injured. As well might it be claimed that a person struck by a revolving crank of a washing machine, the operating power of which was electricity, was injured by an electrical appliance. Cars and machinery of all kinds are operated by electricity yet it cannot be said that such mere consumers of electric current are themselves electrical appliances.”⁹¹

90. *Robilotto v. Bartholdi Realty Co.*, 104 Misc. 419.

91. *Balcom v. Ellintuch & Yarfitz*, 179 App. Div. 548, 166 N. Y. S. 841, 16 N. C. C. A. 681.

§ 105. **Mining—Quarrying.**—The word “mining” is often used in a very broad sense, and in such sense it includes quarrying, as, for instance, of slate from an open quarry.⁹² The term includes the whole mode of obtaining metals and minerals from the earth.⁹³

“Taking ore from the surface of the earth or shallow pits is as much mining as if it were dug from deep mines.⁹⁴ It is sometimes expressly used as covering and including sinking, drilling, boring, and operating wells for petroleum and natural gas.⁹⁵ The procurement of coal by digging in the earth is termed “mining.”⁹⁶ “Mining operation” has to do with the working of a mine, and a “mine,” defined as an excavation in the earth for the purpose of getting metal ores or coal, does not include an oil well.⁹⁷

“Quarry” is not properly applicable to the comparatively slight excavation on land made primarily for purposes of construction there on, and not primarily for the purpose of disposing of the rock, or stone or other material taken out. It is similar to a mine, in the sense that the material removed, be it mere rock, or stone, or valuable marble, is removed because of its value for some other purpose and in the sense that it is not removed for the purpose of improving the property from which it is taken. It is distinguished from a mine in the fact that it is usually open at the top and front, and the ordinary acceptation of the term, in the character of the material extracted.⁹⁸

“Pits” is synonymous with “Quarry,” signifying a large opening in the earth from which rock or ores are taken.⁹⁹ So,

92. *Burdick v. Dillion*, 144 Fed. 737, 75 C. C. A. 603; *In re Mathews Consol. Slate Co.*, 144 Fed. 724.

93. *Williams v. Toledo Coal Co.*, 25 Oreg. 426.

94. *Coleman v. Coleman*, 1 Pearson (Pa.) 470.

95. *Consumer's Gas Trust Co. v. Quinby*, 137 Fed., 882, 70 C. U. A. 220; *State v. Indiana & Ohio O., G. & M. Co.* 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579.

96. *Escoot v. Crescent Coal & Nav. Co.*, 56 Oreg. 190, 106 Pac. 452.

97. *Guffey Petroleum Co. v. Murrel*, 127 La. 466, 53 So. 705.

98. *Ex parte Kelso*, 147 Cal. 609, 82 Pac. 241, 109 Am. St. Rep. 178.

99. *Guffey Petroleum Co. v. Murrel*, 127 La. 466, 53 So. 705.

"coal bed" may be used in the sense of "quarry."¹ "Working the quarry" means the working of the pit, and the doing of any work necessary for the proper and convenient use of the pit, such as the removal of earth, debris, water, ice, or snow, would be working the quarry as truly as the blasting and removal of the slate.²

§ 106. **Night Watchman.**—Where a night watchman's duties included the firing of boilers and filling of glue vats he was an employee engaged in a hazardous employment.³ A nightwatchman in a bakery at a time when it was not in operation was not engaged in a hazardous employment.⁴

§ 107. **Oil and Gas Wells.**—Prior to the amendment of 1916, to the New York Act, the operation of oil or gas wells was not considered a hazardous occupation.⁵

§ 108. **On, In, Or About.**—The words "on, in, or about," as appear in some of the acts, are used in reference to area. The act may sometimes apply in a particular case by the area of the factory, plant or work following or continuing with the employee to the place of accident on account of the nature of the work.⁶

By the Workmen's Compensation Act of England, 1897, it was necessary that the employment should be "on, in, or about" the works of the employer. The words were held to refer to locality, and restricted the liability of the employer, confining it to such accidents as happened on, or in, the premises where the business

1. *Hoysradt v. Delaware, L. & W. R. Co.*, 151 Fed. 321.

2. *Miller v. Chester Slate Co.*, 129 Pa. 81.

3. *Hellman v. Manning Sand Paper Co.*, —N. Y. App. Div.—, 162 N. Y. S. 335, B. I. W. C. L. J. 1335.

4. *Fogarty v. National Biscuit Co.*, N. Y. App. 161 N. Y. S. 937, B. I. W. C. L. J. 1379.

5. *Tillburg v. McCarthy & Townsend*, 170 App. Div. 593, 166 N. Y. S. 878; *Bacon v. McCarthy & Townsend*, 179 App. Div. 965, 166 N. Y. S. 880, 16 N. C. C. A. 675, Nor a butter maker. *Pardy v. Boomhower Grocery Co.*, 178 N. Y. App. Div. 347, 164 N. Y. S. 775, 16 N. C. C. A. 676.

6. *Atkinson v. Plumb*, (1903), 1 K. B. 861, 88 L. T. 789, 72 L. J. K. B. 460, 199 L. Rep. 412, 51 W. R. 516, 5 W. C. C. 106.

of the employer was carried on, or at places in close contiguity thereto. Several attempts were made to induce the courts to construe the words as applying to the description of work mentioned, and thus including the business carried on instead of the place where it was carried on. These attempts were unsuccessful, for in *Powell v. Brown* (1899), 1 Q. B. 157, 79 L. T. 631, 68 L. J. Q. B. 151, 15 T. L. Rep. 65, the court declared its view that the words must refer to locality, and locality only. The House of Lords subsequently adopted the same view in *Black v. Dick Kerr & Co.*, (1906) A. C. 325, 94 L. T. 802, 75 L. J. K. B. 569, 22 T. L. Rep. 548.⁷

In proceedings under the Kansas workmen's compensation act it was held that where a miner was killed while passing across a railroad track enroute from one mine to another at the direction of his foreman he was not killed in the course of his employment in a hazardous occupation, where there was no showing that there was any connection between the operation of the two mines other than that of ownership, or that the employee had taken a previously defined route or that the accident happened to the deceased while he was working "on, in, or about" a mine within the meaning of the act.⁸

§ 109. **Same—Plant—Factory.**—Where an employee engaged in driving a delivery truck from his employer's plant in Kansas City, Kansas, to its customers in that city and in Kansas City, Missouri, and was injured in Kansas City, Missouri. In holding that there could be no recovery unless plaintiff was injured "on, in, or about" the defendant's factory or packing house, observing that the word "about" was one of locality and not of mere association or connection the court said: "An effort is made to bring the case within the statute, as it has already been construed by the argument that the truck which the plaintiff was driving, being a portion of the equipment used in conducting the defend-

7. *Ruegg. Employers' Lia. and Workmen's Comp.*, (8th ed), 374-375.

8. *Bevard v. Skidmore Patterson Coal Co.*, 101 Kan. 207, 165 Pac. 657, 16 N. C. C. A. 692; *Alvarado v. Flower Bros. Rock Crusher Co.*, —Kan.— 1921, 197 Pac. 1091.

ant's business, was itself a part of the factory. To support this view expressions are quoted tending to show that the truck was a part of the plant. The term 'plant,' however, is quite different from 'factory.' It may well apply to appliances used in carrying on the business, wherever situated. 'Factory' by the statute is restricted to the premises where (mechanical) power is used in manufacturing or preparing articles for sale. The truck was an instrument for the distribution of the finished product rather than of its manufacture or preparation. While in charge of the truck, after the meat had been prepared, the plaintiff was not 'within the danger zone necessarily created by those peculiar hazards to workmen, which inhere in the business of operating the packing house.'⁹

§ 110. **Operation—Engines.**—One engaged in firing a boiler used for heating purposes in an apartment house comes within that class of employees enumerated as being engaged in hazardous occupations.¹⁰

§ 111. **Pile Driving.**—The driving of sheeting down into the sand for the protection of municipal baths is a hazardous occupation, and the fact that at the moment of the injury the employee might have been doing something more incidental to the making of baths than the driving of the sheeting into the sands, is immaterial.¹¹

§ 112. **Plastering.**—Plastering an apartment house was held not to be a hazardous occupation.¹²

§ 113. **Pleasure Club.**—The court in holding that a corporation, organized for the purpose of acquiring a hunting preserve was within the act when it engaged in a hazardous occupation

9. Hicks v. Swift & Co., 101 Kan. 760, 168 Pac. 905, 16 N. C. C. A. 634.

10. Siegreth v. Goldberg, 175 App. Div. 452.

11. Mazzarisi v. Ward & Tully, 170 App. Div. 868, 156 N. Y. Supp. 964, 16 N. C. C. A. 674.

12. Solomon v. Bonis, 181 App. Div. 672, 167 N. Y. S. 676, 16 N. C. C. A. 675.

said: "I cannot believe that any membership corporation which sees fit to engage in a hazardous business carried on by it for pecuniary gain, can be heard to plead, in defense of a claim for compensation by an employee injured in such employment, that it had no legal right to engage in such employment, or to employ its injured or deceased employee therein. The fact that engaging in such occupation was ultra vires furnishes no immunity whatever, either to the employer or insurance carrier."¹³

In affirming the appellate division's decision the court of appeals said: "The commission has found that the appellant was engaged in the operation of a country club and in connection therewith in the business of ice harvesting, forestry and logging; that it conducted this business for pecuniary gain; that Uhl was at the time of his death employed by it as a lumberman and while so employed was killed. We think there was ample evidence to support these findings. Whether a club or an individual owning a tract of woodland is or is not engaged in forestry and logging for pecuniary gain is a question of degree. It could not be said that the owner of a city lot who cut a tree and sold the timber was so engaged. Nor where a farmer here and there felled trees on his farm. But where the owner of a large tract of woodland cuts and sells the lumber upon it regularly, although that work may be incidental to his main business, he comes within the definition of the statute."¹⁴

A Golf Club maintained exclusively for golf and social purposes, supported by dues, conducting its restaurant at a loss, and not declaring nor expecting to pay dividends is not engaged in a "business for pecuniary gain" and therefore does not come within the act.¹⁵

§ 114. **Power Machinery.**—"The Washington act does not say, nor does it imply, that every place in which power-driven

13. Uhl v. Hartwood Club, 177 App. Div. 41, 163 N. Y. S. 744, 16 N. C. C. A. 686.

14. Uhl v. Hartwood Club, 221 N. Y. 588, 116 N. E. 1000, 16 N. C. C. A. 686.

15. Francisco v. Oakland Golf Club, —App. Div.— (1920), 185 N. Y. S. 97, 7 W. C. L. J. 229.

machinery is employed impresses an extrahazardous character on work to be performed in such place. It merely employs the circumstance of the presence of power-driven machinery in connection with a number of other things in defining a workshop. If the presence of power-driven machinery is the sole determining factor, then every shaft in which is operated a power-driven elevator or lift is a workshop. Then, also, the operator of the elevator and every employee of appellant who in the course of his duties had occasion to enter the elevator to pass from one floor to another would be employed, for the time being, in a room or place wherein power-driven machinery is employed, hence a workshop, and in an extrahazardous work." Though the respondent was injured in a place where power-driven machinery was employed, it cannot by the widest stretch of the meaning of the statute be termed a workshop. Though his regular employment was at times fraught with hazard, as are all employments, it was not one which, to use the language of section 2 of the act, has 'come to be, and to be recognized as being inherently and constantly dangerous.' Neither was it connected with any of the occupations enumerated as extrahazardous in section 2, nor is it mentioned in any of the schedules in section 3, or in any of the classification in section 4.

"Neither the work of a janitor in an office building nor working in or about an elevator shaft has yet been classified by the department as extrahazardous, nor has any rate of contribution been fixed."¹⁶

A handy man employed in all parts of a business engaged in the manufacture of hydrogen peroxide and other chemical preparations employing electric power-driven machinery was engaged in an extrahazardous occupation within the protection of the act.¹⁷

An electric power company, operating street railways comes within the Texas act, in so far as pertaining to the employees en-

16. *Remsnider v. Union Savings & Trust Co.*, 89 Wash. 87, Ann. Cas. 1917D, 40, 154 Pac. 135, 16 N. C. C. A. 695.

17. *Hydrox Chemical Co. v. Indus. Comm.*, — Ill. —, (1920), 126 N. E. 564, 5 W. C. L. J. 811.

gaged in operating the electric power department of its business.¹⁸

§ 115. **Private Railroad.**—When the Minnesota Workmen's Compensation Act was amended by Chapter 193, Laws of 1915, so as to exclude employees of all railroad companies operating steam railroads as common carriers, the legislative intent was that private steam railroads not engaged as common carriers should remain therein, in the absence of an express election not to be bound by the act.¹⁹

§ 116. **Process Server.**—A process server for a street railway company is not sufficiently connected with the hazardous employment of the company to entitle him to compensation for an injury sustained while riding on one of its cars for his own convenience.²⁰

§ 117. **Road Building.**—Work on a state highway is not ordinarily considered a hazardous occupation.²¹ The building of an ordinary dirt road is not an extrahazardous occupation, nor is it work in connection with a structure within the meaning of the act.²² Roadbuilding when accompanied with the use of large quantities of explosives, is considered extrahazardous.²³

§ 118. **Salesman.**—The fact that the employer is conducting a hazardous employment, will not operate to bring a traveling

18. *Eastern Texas Electric Co. v. Woods*, —Tex. Civ. App. —, (1921), 230 S. W. 498.

19. *State ex rel. Winston-Dear Co. v. District Court of St. Louis Co.*, —Minn. —, 176 N. W. 749, 5 W. C. L. J. 711.

20. *Brown v. Richmond Light & R. Co.*, 173 App. Div. 432, 159 N. Y. S. 1047, 16 N. C. C. A. 637.

21. *Board of Commissioners of Kingfisher County v. Grimes*, —Okla. —, (1919) 182 Pac. 897, 4 W. C. L. J. 636; *Brennan v. Indus. Comm.* —Ill. —, (1919), 124 N. E. 297, 4 W. C. L. J. 603.

22. *McLaughlin v. Indus. Bd.* 281, Ill. 100, 117 N. E. 819, 16 N. C. C. A. 682, 1 W. C. L. J. 504.

23. *McLaughlin v. Indus. Bd. of Ill.*, 281 Ill. 100, 117 N. E. 819, 16 N. C. C. A. 677, 1 W. C. L. J. 504.

salesman from the employer's plant within the terms of the New York Act so as to entitle him to compensation for an injury received while riding in a bus visiting customers.²⁴ One employed to sell sewing machines, deliver and set them up in the purchasers' place of business was not engaged in a hazardous employment.²⁵

§ 119. **Sewer Construction.**—"To come within the act, a workman must be employed in one of the various classes of enterprises named in the statute, and that enterprise must be conducted for the purpose of business, trade or gain," therefore a city constructing a sewer did not come within the provisions of the Kansas Act.²⁶

§ 120. **Slaughter and Packing House.**—The business of a retail grocer who also butchers cattle, sheep and hogs at a slaughter house operated in another place, for sale to his retail customers, and who at his grocery store cuts the meat, makes sausage and renders lard from such animals for sale in a small way, is not engaged in the business of operating a slaughter and packing house within the meaning of schedule "n" of section 18, of the West Virginia Workmen's Compensation Law.²⁷

§ 121. **Smoke Stack Wrecking.**—Wrecking a smoke stack is extrahazardous employment.²⁸

§ 122. **Stable.**—A city ordinance regulating the width of stalls and passageways in private livery, sale or boarding stables does not apply to the stable of an employer engaged in the distribution of dairy products so as to make such business extrahazardous within the meaning of the Illinois act.²⁹

24. *Mandel v. Steinhardt & Bro.*, 173 App. Div. 515, 160 N. Y. S. 2, 16 N. C. C. A. 642.

25. *Singer Sewing Mach. Co., v. Indus. Comm.* — Ill. —, (1921), 129 N. E. 771.

26. *Redfern v. Eby*, — Kan. —, 170 Pac. 800, 16 N. C. C. A. 668.

27. *Williams v. Schehl*. — W. Va. —, (1919), 100 S. E. 280, 4 W. C. L. J. 759.

28. *American Steel Foundries v. Indus. Bd. of Ill.*, 284 Ill. 99, 119 N. E. 902.

29. *Bowman Dairy Co. v. Indus. Comm.*—Ill.—, (1920), 126 N. E. 596, 5 W. C. L. J. 786.

§ 123. **Storage.**—"The expression 'storage of all kinds and storage for hire' implies that if an employer is storing his own property he may be engaged in a 'hazardous employment.' But the question in this and other similar cases is to determine under what circumstances the employer is engaged in the 'employment' of storing his own property. It is, of course, impossible to enunciate a rule applicable to all cases. Each case as it arises must largely be determined with reference to its own facts. It may be difficult in some cases to draw the line of demarcation. It seems quite clear, however, that in a case like the present, where a merchant is not holding his stock of goods or any part thereof with reference to any future requirements of the market or business contingency, but is endeavoring to sell the same to his customers and is immediately offering, and exposing the same for sale in the ordinary course of his business, such a person is not engaged in the 'employment' of storage."³⁰

It has been held that a general storage and warehouse business is not so extrahazardous in character as to warrant the industrial Commission of Washington to declare it to be within the Compensation Act as amended by the Washington Laws of 1919, c. 131.³¹

A produce dealer who incidentally stores his fruits, vegetables, etc., is not within a provision covering "storage of all kinds." "He was carrying on the business of a produce dealer, limited to a few domestic fruits and vegetables, for pecuniary gain, and whatever of storage was involved in the transaction, it was incident to this business of dealing in produce."³²

One engaged as a "junk dealer in bottles and storage" is not engaged in a hazardous occupation nor does he come within the New York Act designation of "storage of all kinds and storage for hire" the bottles being only stored for sale.³³

Conducting a coal yard does not come within the definition of storage, thereby becoming a hazardous occupation, where the

30. In re Roberto, 180 App. Div. 143, 167 N. Y. Supp. 397.

31. State v. Eyres Storage & Distributing Co., — Wash. —, 198 Pac. 390, (1921).

32.. Dugan v. McArdle, 184 App. Div. 570, 172 N. Y. Supp. 27.

33. Kronberger v. Harlem Bottle Co., 181 N. Y. App. Div. 900, 167 Supp. 400, 16 N. C. C. A. 687.

dealer is not holding the coal for any future requirements of the market or business contingencies but is endeavoring to sell the same to his customers.³⁴

Storage in connection with a retail store for the purpose of immediately disposing of the goods is not such storage as is contemplated by the provisions of the statute making storage a hazardous occupation.³⁵

§ 124. **Street Railway.**—A corporation operating a street railway is engaged in an extrahazardous occupation.³⁶

§ 125. **Structure.**—The term structure has been defined to be "a building of any kind, but chiefly a building of some size and magnificence; an edifice."³⁷ While the word may cover a great variety of form and construction, yet when used in connection with the words "house" and "building," it is evidently intended to simply describe a variety of building.³⁸ It includes that which is built or constructed, an edifice or building of any kind, any piece of work artificially built up or composed of parts joined together in some definite manner.³⁹ It may include work below as well as above ground.⁴⁰ Laying a water main was erecting a "structure," within the meaning of the Wisconsin Labor Law, providing that a person employing another in labor of any kind in erecting, repairing, or painting of a house, buildings, or structure shall not furnish for the performance of such labor, scaffold-

34. *Roberto v. John F. Schmadeke, Inc.*, 180 N. Y. App. Div. 143, 167 N. Y. S. 397, 11 N. C. C. A. 687.

35. *Walsh v. F. W. Woolworth Co.*, 180 App. Div. 120, 167 N. Y. S. 394, 16 N. C. C. A. 689; *Dugan v. H. J. McArdle, Inc.*, 184 App. Div. 570, 172 N. Y. Supp. 27, 2 W. C. L. J. 919.

36. *McCabe v. Brooklyn Heights R. Co.*, 177 N. Y. App. Div. 107, 162 N. Y. Supp. 741, 16 N. C. C. A. 669.

37. *Conley v. Lackawanna Iron & Steel Co.*, 94 App. Div. 149, 88 N. Y. Supp. 123; *Anderson v. State*, 17 Tex. App. 305; *Favro v. State*, 39 Tex. Cr. Rep. 452, 46 S. W. 932, 73 Am. St. Rep. 950.

38. *Conley v. Lackawanna Iron & Steel Co.*, 94 App. Div. 149, 88 N. Y. Supp. 123.

39. *Lewis v. State*, 69 Ohio St. 473, 69 N. E. 980.

40. *Kosidowski v. Milwaukee*, 152 Wis. 223, 139 N. W. 187.

ing, hoist, stays, ladders, or other mechanical contrivances which are unsafe, etc.⁴¹ The word has been held to include a car,⁴² a derrick,⁴³ an oil well derrick,⁴⁴ a machine,⁴⁵ an aqueduct,⁴⁶ a canal,⁴⁷ a dirt fill,⁴⁸ a sky sign erected on the roof of a building,⁴⁹ a fence,⁵⁰ a bay window,⁵¹ a railroad,⁵² elevated railroad tracks,⁵³ electric poles and wires,⁵⁴ a mine or pit sunk within a mining claim,⁵⁵ passageways in mines,⁵⁶ a vessel in course of construction,⁵⁷ a sea-going vessel in dry dock for repairs,⁵⁸ a vessel to the sides of which iron plates were being attached,⁵⁹ a boiler

41. *Kosidowski v. Milwaukee*, 152 Wis. 223, 139 N. W. 187.

42. *Corbett v. New York Cent. & H. R. Co.*, 151 App. Div. 159, 135 N. Y. Supp. 137; *Caddy v. Interborough Rapid Tr. Co.*, 125 App. Div. 681, 110 N. Y. Supp. 162, 195 N. Y. 415, 88 N. E. 747, 30 L. R. A. (N. S.) 30.

43. *Stevens v. Stanton Const. Co.*, 153 App. Div. 82, 137 N. Y. Supp. 1024; *Kosidowski v. Milwaukee*, 152 Wis. 223, 139 N. W. 187.

44. *Showalter v. Lowndes*, 56 W. Va. 462, 49 S. E. 448, 3 Ann. Cas. 1096, Citing *Loonie v. Hogan*, 9 N. Y. 435, 61 Am. Dec. 683; *Lyon v. McGuffey*, 4 Pa. 126, 45 Am. Dec. 675.

45. *Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913D, 266.

46. *Nash v. Com.*, 174 Mass. 335, 54 N. E. 865.

47. *Pacific Rolling Mill Co. v. Bear Valley Irr. Co.*, 120 Cal. 94, 52 Pac. 136, 65 Am. St. Rep. 158.

48. *Clement's Adm'rs. v. Putman*, 68 Vt. 285, 35 Atl. 181.

49. *New York v. Wineburgh Advertising Co.*, 122 App. Div. 748, 107 N. Y. Supp. 478; *Kobbe Co. v. New York*, 122 App. Div. 755, 107 N. Y. Supp. 489.

50. *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

51. *State v. Kean*, 69 N. H. 122, 45 Atl. 256, 48 L. R. A. 102.

52. *Giant Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. 470, 8 L. R. A. 700; *Ban v. Columbia Southern R. Co.*, 117 Fed. 21, 54 C. C. A. 407; *New York, N. H. & H. R. Co. v. New Haven*, 70 Conn. 390, 39 Atl. 597.

53. *Flanagan v. Carlin Const. Co.*, 134 App. Div. 236, 118 N. Y. Supp. 953.

54. *Forbes v. Willamette Falls El. Co.*, 19 Oreg. 61, 23 Pac. 670, 20 Am. St. Rep. 793.

55. *Helm v. Chapman*, 66 Cal. 291, 5 Pac. 352. Contra, *Williams v. Mountaineer Gold Min. Co.*, 102 Cal. 134, 34 Pac. 702.

56. *Jackson v. Yak Mining, M. & T. Co.*, 51 Colo. 551, 119 Pac. 1058.

57. *Chaffee v. Union Dry-Dock Co.*, 68 App. Div. 578, 73 N. Y. Supp. 908.

58. *Gruner v. Texas Co.*, 133 App. Div. 413, 117 N. Y. Supp. 741.

59. *Herman v. Fitzgibbons Boiler Co.*, 136 App. Div. 286, 120 N. Y. Supp. 1074.

and engine, built in the basement of a building and constructed on permanent foundations, the boiler being inclosed by a brick wall.⁶⁰

An oil well, with derrick, engine, boiler, pumps, piping, and appliances attached thereto, was held to be a structure.⁶¹ It has been held that the word "structure" does not include a common dirt road,⁶² a town site,⁶³ a mine,⁶⁴ a boiler,⁶⁵ a railroad,⁶⁶ a spillway in connection with a dam,⁶⁷ a moving train of cars,⁶⁸ the building of a broom-corn shed on a farm,⁶⁹ swings or seats in a dancing hall,⁷⁰ a fence enclosing a railroad right-of-way,⁷¹ a building after it has been torn down.⁷²

§ 126. **Subway.**—Under the New York Act a city is engaged in a hazardous employment when it is constructing a subway, irrespective of the definition of the word "employment" given in the act.⁷³

60. *Phoenix Ins. Co. v. Luce*, 11 Ohio Cir. Ct. Rep. 476, 5 O. C. D. 210.

61. *Haskell v. Gallagher*, 20 Ind. App. 224, 50 N. E. 485, 67 Am. St. Rep. 250.

62. *McLaughlin v. Industrial Board*, 281 Ill. 100, 117 N. E. 819.

63. *Armitage v. Bernheim*, — Idaho —, 187 Pac. 938.

64. *Williams v. Mountaineer Gold Min. Co.*, 102 Cal. 134, 34 Pac. 702.

65. *Conley v. Lackawanna Iron & Steel Co.*, 94 App. Div. 149, 88 N. Y. Supp. 123.

66. *Massillon Bridge Co. v. Cambria Iron Co.*, 59 Ohio St. 179, 52 N. E. 192.

67. *McMillen v. Mart*, — Tex. —, 149 S. W. 270.

68. *Lee v. Barkhamsted*, 46 Conn. 213. The court in this case said, in part: "We think the railroad track would be a structure. But the track was not the cause of the injury, even as claimed by the defendants, but appearance and noise of the moving train on the track was the cause, and this cannot well be construed as a part of the structure. The latter word in its connection, being a structure 'placed on such road,' obviously refers to some permanent stationary erection, rather than to a moving car or locomotive engine."

69. *Uphoff v. Industrial Board*, 271 Ill. 312, 111 N. E. 328, L. R. A. 1916E, 329, Ann. Cas. 1917D, 1.

70. *Lothian v. Wood*, 55 Cal. 159.

71. *State v. Walsh*, 43 Minn. 444, 45 N. W. 721.

72. *Mulligan v. State*, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435.

73. *Sexton v. Public Service Commission, City of New York*, — N. Y. App. Div. —, 167 N. Y. S. 493, 16 N. C. C. A. 668.

§ 127. **Threshing Machine.**—One engaged in feeding a threshing machine which is not a hazardous occupation cannot claim to be within the act on the ground that he is engaged in operating a vehicle, since the feeding did not begin until the machine became stationary.⁷⁴

One employed to feed a bean thresher, engaged in threshing beans for various farmers at their respective farms, and who injured his finger while pushing the thresher into a barn, was allowed compensation.⁷⁵

§ 128. **Undertaking.**—The business of undertaking is not an extrahazardous occupation and an employee injured while driving for another undertaking establishment could not be considered as engaged as a common carrier by land in order to bring him within the act.⁷⁶

§ 129. **Upholstering—Carpet Laying.**—The laying of carpets is not upholstering and cannot be considered such in order that it would bring the injured employee's occupation within the class designated as hazardous.⁷⁷

§ 130. **Vehicles.**—The provision of the New York Act relating to the operation of vehicles, includes an express man while delivering a package from his vehicle;⁷⁸ a helper on a motor truck, while chasing mischievous boys;⁷⁹ a taxicab starter, injured by slipping on a hotel stairway;⁸⁰ a driver removing barrels from his employer's basement;⁸¹ a driver putting his horse in its

74. *Vincent v. Taylor Bros.*, 180 App. Div. 818, 168 N. Y. S. 287, 16 N. C. C. A. 673, 1 W. C. L. J. 692.

75. *Hennessey v. Markendorf*, 222 N. Y. 647.

76. *Hochspeler Inc. v. Indus. Bd.*, 278 Ill. 523, 116 N. E. 121, 16 N. C. C. A. 665.

77. *Strader v. Stern Bros.*, 184 App. Div. 700, 172 N. Y. Supp. 482, 3 W. C. L. J. 191.

78. *Miller v. Taylor*, 173 App. Div. 865.

79. *Hendricks v. Seeman Bros.*, 170 App. Div. 133.

80. *David v. Town Taxi Co.*, 175 App. Div. 958.

81. *King v. Gross & Co.*, 179 App. Div. 966.

stall;⁸² a driver helping to repair a hand elevator which he used in delivering his load into a basement;⁸³ but a driver for a coal and wood firm injured while splitting wood, is not included within the phrase "operation of vehicles,"⁸⁴ nor is an employee who has nothing to do with the operation of the vehicle, but whose duty in connection with the vehicle is merely loading it;⁸⁵ nor is a driver, injured while making deliveries afoot, several hours after putting up his horse;⁸⁶ nor is the driver of a florist's wagon while adjusting a window box for a customer, such work being in no way connected with the duties of a driver;⁸⁷ nor is a superintendent of milk routes while on his way by street car to a route where he was to instruct a new driver.⁸⁸

An elevator is not a vehicle, within the meaning of this provision.⁸⁹ Nor is a hand sled,⁹⁰ nor a hand truck.⁹¹

A driver of a truck used in collecting dirt from city streets was engaged in the operation of vehicles, which is a hazardous employment.⁹²

A policeman who, for his own convenience, was riding with a truck-man not in the employ of the village, and who was injured while alighting, was not at the time engaged in a hazardous occupation within the meaning of the Compensation Act.⁹³

A salesman riding a motor cycle furnished by his employer for use in his work is engaged in a hazardous employment.⁹⁴

82. *Smith v. Price*, 168 App. Div. 421.

83. *Kasper v. Clark & Wilkins Co.*, 175 App. Div. 958.

84. *Casterline v. Gillen*, 182 App. Div. 105.

85. *Hassen v. Elm Coal Co.*, 184 App. Div. 715; *Roberto v. Schmadeke*, 180 App. Div. 143.

86. *Newman v. Newman*, 169 App. Div. 745, 218 N. Y. 325.

87. *Glatzel v. Stumpp*, 141 App. Div. 901, 220 N. Y. 71.

88. *Balk v. Queen City Dairy Co.*, 184 App. Div. 631.

89. *Wilson v. Dorflinger & Sons*, 218 N. Y. 84.

90. *Rice v. All-Package Grocery Stores*, 4 N. Y. Bul. 130, 19 S. D. R. 473.

91. *Holtz v. Greenhut & Co.*, 175 App. Div. 878.

92. *Putman v. Murray*, 174 App. Div. 720.

93. *Spinks v. Village of Marclus*, 108 N. Y. App. Div. 732.

94. *Mulford v. A. S. Pettit & Sons*, 220 N. Y. 540, 116 N. E. 344, B. 1 W. C. L. J. 1203.

An employee traveling with a threshing machine, although such work is not enumerated as a hazardous occupation it comes under the classification of vehicles and is within the compensation act.⁹⁵

A snow scraper was held to be a vehicle within the meaning of the New York act making the operation of vehicles a hazardous occupation.⁹⁶

An employee, engaged solely in the care of horses used by a company to draw its wagons is engaged in the operation of wagons, which entitles him to compensation equally with the actual drivers.⁹⁷

§ 131. **Vessels—Unloading.**—A weigher of hides as they were unloaded from vessels was engaged in a hazardous occupation.⁹⁸

The operation of vessels includes loading and unloading of vessels, within the New York Act. When the employer and owner is a New York Corporation, there is a presumption that the vessel is not one of another state or country.⁹⁹

§ 132. **Warehouse.**—“A warehouseman in the general acceptance of the term is one who receives and stores goods of others as a business, and for a compensation or profit. And it has been held that the fact that one receives no compensation for storage tends to show that he is not a warehouseman.”¹

The Illinois constitution of 1871, art. 13, sec. 1, provides that “All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses.”

One engaged in Illinois in storing grain for a compensation

95. *White v. Loades*, 178 App. Div. 236, 164 N. Y. Supp. 1023, 16 N. C. C. A. 673.

96. *Berg v. Hetzler Bros.*, 179 App. Div. 551, 166 N. Y. Supp. 830, 16 N. C. C. A. 672.

97. *Costello v. Taylor*, — N. Y. —, 111 N. E. 755, 11 N. C. C. A. 320.

98. *Hiers v. John A. Hull & Co.*, 178 App. Div. 350, 164 N. Y. S. 767, B. 1 W. C. L. J. 1337.

99. *Edwardsen v. Jarvis Lighterage Co.*, 168 App. Div. 368.

1. 27 R. C. L., p. 950, Sec. 2.

in an elevator and its appurtenances, is a public warehouseman.² It is also held in Illinois, however, that a building in which a meat corporation stores its products pending their sale and distribution to local dealers is a "warehouse or general or terminal storehouse," within the meaning of the Workmen's Compensation Act, although no goods are stored for the public for hire.³

"Nor can it be limited so as to apply only to a building where the public can send their goods to be stored for them, as in the case of the large furniture repositories. The word is applicable to a building used by the owner for the storage of his own goods, though it has no connection of any sort with water transit.

* * * While it may be difficult to define 'warehouse,' I am of the opinion that, as used in the Act of 1897, it involves the idea of a place normally of considerable size, mainly used for the storage of goods in bulk or in large quantities, and in which consequently the dangers incident to the handling of goods in bulk or in large quantities might naturally arise."⁴

"I think that, upon the admitted facts as stated to us, there was clearly a *prima facie* case that these premises were a warehouse. The premises were used for the purpose of breaking up old iron for sale. Very large quantities of old iron were kept stored in large covered sheds upon the premises."⁵

A warehouse used by a corporation for the storing and vending of its commodities which contains an electric elevator and is located in a city which regulates by ordinance the use and operation of elevators, is an extra-hazardous enterprise, within the Illinois Act of 1913.⁶

Under the Warehouse Act of Oregon, a warehouse is a place where any of the commodities enumerated in the Act are received on storage for the owner by some one engaged in the general business of receiving such goods in store for profit or compensation.⁷

2. National Bank v. Langan, 28 Ill. App. 401.

3. Armour & Co. v. Industrial Board, 275 Ill. 328, 114 N. E. 173.

4. Green v. Britten, 6 W. C. C. 82.

5. Wilmott v. Paton, 4 W. C. C. 65.

6. Armour & Co. v. Industrial Board, 197 Ill. App. 363.

7. State v. Stockman, 30 Oreg. 36, 46 Pac. 851.

It has been held that a general storage and warehouse business is not so extra-hazardous in character as to warrant the Industrial Commission of Washington to declare it to be within the Compensation Act as amended by the Washington Laws of 1919, c. 131.⁸

A retail furniture company which maintained a warehouse for the storage of its furniture, from which distribution was made to its customers was engaged in a hazardous occupation and was automatically brought within the provisions of the act in the absence of any affirmative action on its part to reject the act, therefore a truck driver engaged in delivering from the warehouse at the time of a collision between his truck and a street car came under the protection of the act.⁹

Where the operation of a warehouse in connection with docks and wharves was essentially dangerous, it was held to be hazardous employment.¹⁰

§ 133. **Window Cleaning.**—While washing windows is not specifically enumerated as one of the hazardous employments, it does come within the enumerated class of "building, maintaining, repairing or demolishing of any structure, which the legislature has seen fit to classify as extrahazardous."¹¹

In holding that a window washer who was injured in the course of his employment was entitled to compensation under the New York act the court said: "The commission properly disregarded the objection and made the award. It was held in the case of *Matter of Mulford v. Pettit & Sons*, 220 N. Y. 540, 116 N. E. 540, 116 N. E. 344 (1917), as to an accidental injury happening in July, 1915, that an employ   while engaged in a hazardous employment which was incidental to the nonhazardous business of his employer was entitled to com-

8. *State v. Eyres Storage & Distributing Co.*,—Wash.—, 198 Pac. 390, (1921).

9. *Friebel v. Chicago Ry. Co.*, 280 Ill. 76, 117 N. E. 467. 13 N. C. C. A. 390.

10. *Obrien v. Indus. Ins. Dept.*,—Wash.—, 171 Pac. 1018, 2 W. C. L. J. 171; 16 N. C. C. A. 663.

11. *Chicago Cleaning Co., v. Indus. Bd.* 283 Ill. 177, 118 N. E. 989, 16 N. C. C. A. 683.

pensation. By the amendment of subdivision 4 of section 3 of the New York Workmen's Compensation Law chapter 622 of of th Laws of 1916; the doubt which had existed previously to the Mulford decision, as to the proper contruction of the subdivision, under facts similar to those presented by the case at bar, was removed, the amendment providing 'employee' means a person engaged in one of the occupations enumerated in section two.'¹²

Removing a shade for the purpose of washing the window, is incidental to cleaning the window, under the New York Act.¹³

§ 134. **Determination of Question.**—Where the commission declared that conducting a warehouse was an extrahazardous occupation the court in review, assuming for the sake of argument that the commission had such powers, said: "If there be or arise any such plainly hazardous occupation as to bring it under the act, we apprehend that it would come under the act regardless of whether the commission so determined or not. In other words it would be the fact of the existence of such extrahazardous occupation, and not determination of such facts by the commission that would bring it under the act."¹⁴

In discussing the questions of who is entitled to the benefit of the New Hampshire Act the court said: "The test to determine whether an employee is entitled to the benefit of the act is to inquire whether: (1) He was engaged in manual or mechanical labor: (2) any part of his work was done in proximity to hoisting apparatus or power driven machinery (*Morin v. Nashua Mfg. Co.*, 78 N. H. 567, 103 Atl. 312; and (3) whether five or more persons in manual or mechanical labor were employed in and about the mill, etc., in which he worked."¹⁵

12. *Zubradt v. Shepherds Estate*, 180 N. Y. App. Div. 20, 167 Supp. 306, 16 N. C. C. A. 644.

13. *Tracy v. Mertens*, 2 N. Y. Bul. 102, 12 S. D. R. 562.

14. *State v. J. B. Powles & Co.*, 94 Wash. 416, 162 Pac. 569. 16 N. C. C. A. 665.

15. *Regnier v. Rand*, — N. H. —, (1919) 108 Atl. 810, 5 W. C. L. J. 559; *Boody v. K. & C. Mfg. Co.*, 77 N. H. 209, 90 Atl. 859, L. R. A. 1916 A. 10.

Where the employer and the employee agreed that both parties were working under the compensation act, and the only question before the commission was whether the accident arose out of and in the course of employment, the court held that by entering into the agreement the question of jurisdiction was waived and the question whether the employment was hazardous could not be raised on appeal.¹⁶

Where the employer's business falls within the enumerated class of hazardous occupations, and an employee is injured, it will be presumed, in the absence of a showing by the employer that the employee was not engaged in a hazardous occupation, that the employee was so engaged.¹⁷

16. *Chicago Packing Co. v. Indus. Bd.*, 282 Ill. 497, 118 N. E. 727, 16 N. C. C. A. 696.

17. *McQueeney v. Sutphen & Myer*, 167 N. Y. App. Div. 528, 11 N. C. C. A. 326. *Kohler v. Frohmann*, 167 N. Y. App. Div. 533, 11 N. C. C. A. 326; *Larsen v. Paine Drug Co.*, — N. Y. App. Div. —, 155 N. Y. S. 759, 11 N. C. C. A. 327.

CHAPTER V.

PERSONAL INJURY OR DEATH BY ACCIDENT.

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WORKMEN'S COMPENSATION LAWS.

- Sec.
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§ 135. **Definitions.**—"The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Missouri Act Section 7, (b).

The court in a Wisconsin case said: "The term 'accident' as used in the Workmen's Compensation Act is susceptible of being given such scope that one would hardly venture to define its boundaries. Courts have indulged in very general statements in regard to it but have not worked out any very definite guide."¹

The above set out definition from the Missouri Act as applied to an industrial accident resulting in personal injury will avoid much of the controversy that has heretofore arisen under the acts of other states over the construction and application of this term. This definition is copied from the Nebraska Act.²

The payment of compensation to the disabled employee is predicated under most compensation acts³ upon an accident which arose out of and in the course of his employment and directly resulted in the disabling injury. In those states where the terms is not defined in the act itself it is used in the popular sense⁴ and the

1. *Bystrem Bros. v. Jacobson*, 162 Wis. 180, 155 N. W. 919.

2. *Wk. Comp. Act* (Laws 1913, c. 198) §52b) *Johansen v. Union Stockyards Co.*, 99 Neb. 328, 156 N. W. 511. See also 1 *Corpus Juris* 390.

3. In the following states the word "injury" alone is used instead of "accidental injury" or "injury by accident:" California, Colorado, Connecticut, Iowa, Massachusetts, Montana, New Hampshire, Ohio, Texas, Washington, West Virginia, Wyoming and the Federal Act.

4. *Boody v. K and C, Mfg. Co.*, 77 N. H. 208, 90 Atl. 859, L. R. A. 1916 A. 10, 29, 227; *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640 L. R. A. 1916 A. 273, 10 N. C. C. A. 729; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; *Mutual Acc. Ass'n v. Barry* 131 U. S. 100, 121, 33 L. Ed. 60, 9 Sup. Ct. 755, 762; *Adams v. Acme White Lead & Color Wks* 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A 283; *Walker v. Lilleshall Coal Co.*, (1900), 1 Q. B. 488; *Robbins v. Original Gas Engine Co.*, 191 Mich. 122, 157 N. W. 437; *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp 620; *Clayton & Co., v. Hughes* (1910) A. C. 242, 26 T. L. R. 359; *Fenton v. Thorley & Co.* (1903) 5 W. C. C. 6; *Indian Creek Coal etc., Co. v. Calvert* (Ind. App.) 119 N. E. 519, 2 W. C. L. J.

following definition from Webster has usually been adopted by the Courts: "An event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event; chance contingency." This definition has been repeatedly quoted by the courts, added to and embellished, but its numerous variations are immaterial. It is in its application that courts and commissions have differed most widely and frequently gone astray. The above definition from the act, setting out clearly and concisely the necessary elements of the term, will very materially serve to keep its application within the intent and spirit of the act.

As previously stated the acts of most states use the words "injury by accident or accidental injuries" or phraseology to the effect that the injury must be of an accidental nature or origin, otherwise it is not covered by the act.⁵ The Missouri Act, Section 3 reads, "personal injury or death of the employee by accident arising out of and in the course of his employment." Where the word injury is used alone it has generally been held to cover a broader scope than where the element of accident must accompany the injury in order that it may be compensable. As for example in the case of lead poisoning which in Massachusetts is held to be an injury arising out of and in the course of the employment but it is not accidental.⁶ In other words "injury"

230; *Haskell etc., Car. Co. v. Brown*, 64 Ind. App. —, 117 N. E. 555, 1 W. C. L. J. 48; *Hollenbach v. Hollenbach*, 181 Ky. 262, 204 S. W. 152, 2 W. C. L. J. 493; *Lane v. Horn etc., Baking Co., (Pa.)* 104 Atl. 615, 2 W. C. L. J. 922; *Southwestern Insurance Co. v. Pillsbury*, 172 Cal. 768, 158 Pac. 762.

5. *Walther v. American Paper Co.*, 89 N. J. L. J. 732, 98 Atl. 264; *Seel Sales Corp. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 698, 6 W. C. L. J. 303.

6. *Johnson v. London Guarantee & Accident Co., Ltd*, 217 Mass. 388, 104 N. E. 735; *In re Madden*, 111 N. E. 379, 222 Mass. 487; *In re Mooradjian*, 118 N. E. 951, 1 W. C. L. J. 812; *In re Hurle*, 217 Mass. 223, 104 N. E. 336, 4 N. C. C. A. 527, L. R. A. (1916) A. 279; *In re E. L. Hill Op. Sol. Dep. C. & L.*, p. 204; *In re J. B. Irving Op. Sol. Dep., C. & L.*, 211; *In re William Murray Op. Sol. Dep., C. & L.*, p. 201; *In re Willard E. Jule, Op. Sol. Dep. C. & L.*, 261; *Contra*, see *Adams v. Acme White*

where used alone includes all accidents but the word "accident" does not include all injuries. The two terms are not synonymous.⁷

In the Massachusetts case above the court said: "Under the act 'personal injury' is not limited to injuries caused by external violence, physical force, or as a result of accident in the sense in which that word is commonly used and understood, but under the statute is to be given a much broader and more liberal meaning, and includes any bodily injury."

This question does not arise in Missouri and many other states because of the following language of Section (7)b. of the Missouri Act; provisions substantially similar to which are found expressed or implied in many other acts: "The terms 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The said terms shall in no case be construed to include occupational disease in any form, or any contagious or infectious disease contracted during the course of employment, or death due to natural causes but occurring while the workman is at work."

The discussion of "accident," "injury by accident," "accidental injury" and "injury" or "personal injury," will of necessity overlap somewhat the discussion of the phrase "arising out of and in the course of the employment," which, in most Workmen's Compensation Acts, immediately follows the other term.⁸ But since the words "injury" and "accident" as used in Workmen's Compensation laws and decisions have a meaning independent of the above phrase, it is thought best to treat them separately.

In determining whether disability is due to a personal injury by accident within the meaning of the Missouri Act and other acts containing substantially the same provisions, the following elements must be considered. It is immaterial that it was due to

Lead & Color Works, 182 Mich. 157, 148 N. W. 485, 6 N. C. C. A. 482; Miller v. American Steel etc. Co., 90 Conn 349, 97 Atl. 345, See, also, Matthiessen, etc., Zinc Co. v. Industrial Board, 284 Ill. 378, 120 N. E. 249, 2 W. C. L. J. 876; Coates v. City of Elsinore, 3 Cal. L. A. Com. 269.

7. Cooke v. Holland Furnace Co., 200 Mich. 192, 166 N. W. 1013, 1 W. C. L. J. 994, 17 N. C. C. A. 153.

8. It does not follow the word accident in the acts of Michigan, Texas, Wyoming, West Virginia and Wisconsin.

negligence,⁹ as is stated in Section 3, and also in the definition of the word "accident" in Section 7b which reads, "with or without human fault," except of course, such fault or negligence as may be classified as "willful misconduct." The accident resulting in the disability must have been an "unexpected or unforeseen event" which happened "suddenly¹⁰ and violently" and produced at the time "objective symptoms of an injury." The word "objective" is defined by Webster as, "Outward; external; extrinsic; opposite to subjective," and the word "symptom" as, "A perceptible change in the body or its functions indicating the kind or phases of disease." The disability must also be due to "violence to the physical structure of the body" in order that it may be an injury within the meaning of the act. Again quoting from Webster, "violent" is defined by him as "acting or produced by improper force; effected by force; unnatural." In summarizing the necessary elements of a "personal injury by accident" we are confronted by the following questions:

1. Did the event resulting in disability happen suddenly?
2. Was the event unexpected or unforeseen?
3. Did it happen violently, that is, was it effected by force, improper or unnatural?
4. Was that improper or unnatural force applied to the physical structure of the body?
5. Did it at the time produce outward or external and perceptible change in the body or its functions?

If all these questions can be answered in the affirmative there has occurred a "personal injury by accident" within the spirit and intent of those compensation acts that explicitly compensate only for personal injury by accident arising out of and in the course of the employment. While courts and commissions have awarded compensation in many cases wherein one or more of the

9. *Vennen Admr's., etc. v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640; *L. R. A.* 1916A 273; 10 N. C. C. A. 729; *Decatur R., etc., Co. v. Industrial Board*, 276 Ill. 472, 114 N. E. 915; *Grannison's Admr. v. Bates & Rogers Const. Co.*, — Ky. App. —, (1920), 219 S. W. 806, 5 W. C. L. J. 843.

10. *Liondale Bleach, Dye & Paint Works v. Riker*, 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713.

above¹⁰ questions would have had to have been answered in the negative, these questions appear to be, the crystalization of the decisions, as to the necessary elements of a personal injury by accident within the meaning, and intent of the compensation acts generally. The epitome of the decisions the author of the Nebraska Act thus concisely embodied in the above mentioned definition.

The following quotations from opinions in various cases may throw some further light upon the definition of the term "personal injury by accident and its application."

"The words used are 'violence to the physical structure of the body' not injury to the physical structure of the body by external violence. The violence in question may originate from lifting heavy weights, or from other provable causes, for instance intense heat operating directly on the part of the body internally affected (see *Lane v. Horn & Hardart Co.*, 104 Atl. 615) which effect a sudden change in the physical structure or tissues of the body, and still be within the compensation act."¹¹

"It is insisted that no 'unexpected or unforeseen event, happening suddenly and violently' occurred; that sickness arising from the placing of his body by plaintiff against the beams and surging back and forwards could not be said to be 'an unforeseen event;' and that it did not happen suddenly and violently except as it was produced by plaintiff himself. It is said that the language 'was clearly meant to limit recoveries to accident such as the breaking of machinery, or the unexpected cutting or wounding of employee's person by some breaking or falling or exploding of apparatus, machinery or tools.' To hold this would unduly limit the meaning of this clause (Neb. Rev. St. 1913, Sec. 3693). The unforeseen event was the straining, weakening or lesion of the blood vessels of the brain or stomach, and this was an unforeseen event happening suddenly. It is also said that no 'objective symptoms' of an injury appeared at the time, and that these elements are essential. We agree with this argument so far that the accident must produce 'at the time objective symptoms of an injury,' but the difficulty is as to what constitutes objective symptoms.

11. *McCauley v. Imperial Wollen Co. et al.*, — Pa. —, 104 Atl. 617, 17 N. C. C. A. 864.

Defendant's idea is that by objective symptoms are meant symptoms of any injury which can be seen, or ascertained by touch. We are of the opinion that the expression has a wider meaning, and that symptoms of pain and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly voluntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute."¹² The court in a Wisconsin case said: "The term 'accidental,' as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that it was an external act or occurrence which caused the personal injury."¹³ Though muscular spasm caused by straining the muscles of the right side while attempting to lift a heavy cement block while in a sitting position was held to be an accident within the meaning of the Wisconsin Workmen's Compensation Act.¹⁴

Quoting further from opinions in other cases: "The statute seems to contemplate that an accidental injury may result from mere mischance, that accidental injuries may be due to carelessness, not willful, to fatigue, and to miscalculation of the effects of voluntary action."¹⁵ "A workman cannot recover compensation under the Act, unless he can satisfy the court that there is a particular time, place and circumstance in which the injury by accident happened."¹⁶ "It seems to me that these interpretations of the word point to some particular event or occurrence which may happen at an ascertainable time, and which is to be distinguished from the necessary and ordinary effect upon a man's constitution of the work in which he is engaged day by day. So defined the word 'accident' seems to me to exclude the anticipated and natural consequence of continuous labor."¹⁷ "An 'accident'

12. *Manning v. Pomerene*, 101 Neb. 127, 162 N. W. 492, 14 N. C. C. A. 536.

13. *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640, L. R. A. 1916 A. 273.

14. *Bystrom Bros. v. Jacobson*, 162 Wis. 180, 155 N. W. 919, 10 N. C. C. A. 729.

15. *Robbins v. Original Gas Engine Co.*, 191 Mich. 122, 157 N. W. 437.

16. *Martin v. Manchester Corp.*, 5 B. W. C. C. 259 C. A.

17. *Coe v. Fife Coal Co., Ltd.*, 2 B. W. C. C. 259

is simply an undesigned sudden and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force. The word 'undesigned' must not be taken too literally in this connection because a person may suffer injury accidental to him, under circumstances which may include the design of another."¹⁸

The event, to constitute an accident, must be one that is unforeseen; that is, unforeseen by the person injured by its occurrence. The standard taken is not necessarily the intelligence or foresight of the average person. Indeed, it has been declared that an occurrence is unexpected if it is not expected by the person who suffers by it, even though every man of common sense who knew the circumstances would think it certain to happen.¹⁹

The fact that the result of an extraordinary exertion by a man of impaired physique would have been expected or contemplated as a certainty by a physician, if he had previously examined the man, means nothing in this regard. Although the result may have been due to the willful act of another, if it was unintended or unforeseen by the person suffering injury therefrom, the occurrence is nevertheless an accident.²⁰

The words "undesigned" or "unforeseen" refer to the result produced, and not to its cause. When a man lifts a heavy weight, he intends to do exactly what he does do; nevertheless if he strains a muscle, or ruptures a blood vessel, the injury is due to an accident.²¹

"An injury, to be accidental or the result of an accident, must be traceable to a definite time, place and cause."²²

18. *Dillilend et al., v. Ash Grove Lime & Portland Cement Co.*, 104 Kan. 771, 180 Pac. 793, 4 W. C. L. J. 187.

19. *Clover, etc., Co. v. Hughes*, 102 L. T. Rep. 340, 343, 26 T. L. Rep. 359, 1910 A. C. 242, 3 B. W. C. C. 275.

20. *Challis v. London, etc., R. Co.*, 93 L. T. Rep. 330, 1905 2 K. B. 154, 21 T. L. Rep. 486, 7 W. C. Cas. 23, 74 L. J. K. B. 569, 53 Wkly. Rep. 613.

21. *Stewart v. Wilsons, etc., Coal Co.*, 5 Sc. Sess. Cas. (5th series) 120.

22. *Matthiessen & Hegeler Zinc Co. v. Industrial Board et al.*, 284 Ill. 378, 120 N. E. 249, 2 W. C. L. J. 875; *Steel Sales Corporation v. Indus. Comm.*, — Ill. —, 127 N. E. 698, 6 W. C. L. J. 303. It must be sudden.

"It (the act) does not afford compensation for injuries or misfortunes, which merely are contemporaneous or coincident with the employment, or collateral to it. Not every diseased person suffering a misfortune while at work for a subscriber is entitled to compensation. * * * The personal injury must be the result of the employment and flow from it as the inducing proximate cause. * * * The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being."²³

"That an injury received by a workman while engaged in his usual work, without intervention of something unusual or fortuitous is not an accident, is now so well established by our decisions that the proposition needs no discussion."²⁴

"Personal injury as that term is used in the workman's compensation act, has reference not to some break in some part of the body or some wound thereon, or the like, but rather to the consequences or disability that results therefrom."²⁵

"'Personal injury' within the meaning of the statute is a bodily injury due to accident. We define an accidental bodily injury as a localized abnormal condition of the living body, directly and contemporaneously caused by accident¹ an accident as an unlooked for mishap, or an untoward event or condition not expected. The concurrence of accident and injury are conditions precedent to the right to compensation."²⁶

"The fact that appellee was suffering from a mental or nervous condition resulting from a physical injury, rather than from the physical injury itself, cannot have the effect of relieving appellant from liability. This court is committed to the doctrine

McArdle v. Swansea Harbour Trust, 8 B. W. C. C. 489, 11 N. C. C. A. 175; Liondale Bleach, Dye & Paint Works v. Rikes, 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713.

23. Madden's case, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916, D. 1000.

24. Guthrie v. Detroit Shipping Co., 200 Mich. 355, 167 N. W. 37.

25. Indian Creek Coal & Mining Co. v. Calvert, (Ind. App.), 119 N. E. 519; 2 W. C. L. J. 230; Kingan Co. v. Ossom, (Ind. App.), 121 N. E. 289, 17 N. C. C. A. 784.

26. Ahern v. Spier et. al., 93 Conn. 151, 105 Atl. 340, 3 W. C. L. J. 221.

that a 'personal injury,' as that term is used in the Workmen's Compensation Act, has reference not merely to some break in some part of the body, or some wound thereon or the like, but also to the consequence or disability that results therefrom."²⁷

The Colorado Act uses the terms "personal injury or death accidentally sustained" and "injury proximately caused by accident" in providing for what injuries or deaths compensation shall be allowed. By the term "injury" is meant, not only an injury the means or cause of which is an accident, but also an injury which in itself is an accident. The word "by" may mean through the means, act or instrumentality of. Therefore "injury by accident" and "injury caused by accident" are terms or expressions which can be used interchangeably, and death from heart disease accelerated by the inhalation of alfalfa dust while pitching hay was held to be compensable.²⁸

§ 136. **Abscess.**—When a workman is injured while in the course of his employment, and as a direct result of this injury infection develops and causes death, the original injury will be considered as the proximate cause of the death.²⁹

Where there is no evidence that the abscess resulted from an accident the resultant disability is not compensable.³⁰

Disability from ankylosis, resulting from abscesses, following a fracture, was held compensable.³¹

Where a miner, from the use of a pick and kneeling while at work, suffered the gradual formation of abscess on his hands and knees, it was held that he had not been injured by accident.³²

27. *Kingan & Co. Ltd. v. Ossom*, (Ind. App.), 121 N. E. 289, 3 W. C. L. J. 276.

28. *Carroll v. Industrial Comm.*, — Colo.—, (1921), 195 Pac. 1097.

29. In *re Garbally*, Vol. 4, Ohio I. C. No. 5, p. 132; In *re Smith*, Vol. 4, Ohio I. C. No. 5, p. 109; *Nash v. The General Petroleum Co.*, 4 Cal. I. A. C. 103; *Cripps v. Aeta Life Ins. Co.*, 216 Mass. 586, 104 N. E. 565; In *re Joseph L. Porter*, 3rd A. R. U. S. C. C. 103; In *re Patrick J. Mara*, 3rd A. R. U. S. C. C. 104.

30. *Howe v. Fernill Colliers, Ltd.*, 5 B. W. C. C. 629, C. A.

31. *Newcomb v. Albertson*, 85 N. J. L. 435, 89 Atl. 928, 4 N. C. C. A. 783; In *re James F. Williams*, 2nd A. R. U. S. C. C. 119.

32. *Marshall v. East Hollywell Coal Co.*, 7 W. C. C. 19, 21 Times L. R. 494; In *re Freeman H. Murray*, 3rd A. R. U. S. C. C. 104.

Compensation was allowed under the Federal Act for disability resulting from abscesses of the hand caused by handling cold letter box locks.³³

Compensation was denied for ischiorectal abscess alleged to have been caused by the jarring received in bicycle riding, because of the insufficiency of the evidence.³⁴

§ 137. **Actinomycosis.**—An infection of the nose and mouth, contracted as a result of handling grain, was upon conflicting medical testimony held to be an injury arising out of the employment.³⁵

§ 138. **Aggravation of Pre-existing Condition.**—"Likewise the courts, consistent with the theory of workmen's compensation acts, hold with practical uniformity that, where an employee afflicted with disease receives a personal injury under such circumstances as that he might have appealed to the act for relief on account of the injury had there been no disease involved, but the disease as it in fact exists is by the injury materially aggravated or accelerated, resulting in disability or death earlier than would have otherwise occurred and the disability or death does not result from the disease alone progressing naturally, as it would have done under ordinary conditions, but the injury aggravating and accelerating its progress, materially contributes to hasten its culmination in disability or death, there may be an award under the compensation acts."³⁶

An employee's abdomen was injured by a fall in the course of his employment. The court said: "Doubtless there was a diseased condition before the injury; it may be that the injury would not have caused his death but for these antecedent con-

33. In re Henry P. Disley, 2nd A. R. U. S. C. C. 118.

34. In re Frank Banyea, 2nd A. R. U. S. C. C. 118.

35. Hartford Acc. & Indem. Co. v. Indus. Comm., — Cal. App. —, 163 Pac, 225 Al W. C. L. J. 223.

36. In re Bowers, Williams, Colan, 64 Ind. App. 116 N. E. 842, 15 N. C. C. A. 633; St. Clair v. A. H. Meyer Music House, — Mich. —, (1920), 178 N. W. 705, 6 W. C. L. J. 540; Hanson v. Dickinson, — Ia. —, (1920), 176 N. W. 823, 5 W. C. L. J. 837; In re Percy E. Spencer 2nd. A. R. U. S. C. C. 198; Patrick v. J. B. Ham Co. — Me. —, (1921), 111 Atl. 912.

clear from the evidence, would warrant vacating the present award."³⁷

"At the time of his accident, Harry Banks was suffering from typhoid fever in the incubation stage, which became aggravated by the severe injury to his head through the consequent lowering of his resisting power and the said disease thus aggravated caused his death." The court of appeals affirmed a judgment of the appellate division affirming the award.³⁸

Where the employee, while at work, slipped and bumped his neck, went home for three weeks, then worked, then quit, and nine months thereafter died of pulmonary tuberculosis, in affirming an award the court said: "The evidence shows quite clearly, and the commission has found, that the disease existed before the injury, which accelerated the disease and shortened life. The injury caused a hemorrhage, which, so far as the evidence discloses, the deceased never experienced before or after, and there is medical testimony to the effect that such an injury would develop the disease then existing. If an employee has a disease, and having the same, receives an injury 'arising out of and in the course of employment,' which accelerates the disease and causes his death, such death results from injury, and the right to compensation is secured even though the disease itself may not have resulted from the injury."³⁹

37. *Mazarisi v. Ward & Tully*, 170 N. Y. App. Div. 868, 156 N. Y. Supp. 964, 15 N. C. C. A. 634; *Stombaugh v. Peerless Wire Fence Co.*, 198 Mich. 445, 164 N. W. 537, 15 N. C. C. A. 635.

38. *Banks v. Adams Express Co.*, 221 N. Y. 606, 117 N. E. 1060, 15 N. C. C. A. 639; *Utilities Coal Co. v. Herr*, — Ind. App. —, 132 N. E. 262.

39. *Van Keurene v. Dwight Divine & Sons*, 179 N. Y. App. Div. 509, 165 N. Y. Supp. 1049; *In re Bowers*, 64 Ind. App. —, 116 N. E. 842; *Peoria R., etc., Co. v. Indus. Bd.*, 279 Ill. 352, 116 N. E. 651; *Indianapolis Abattoir Co. v. Coleman*, 64 Ind. App. —, 117 N. E. 502, 1 W. C. L. J. 41; *Indian C. C. & Mining Co. v. Calvert*, (Ind. App.), 119 N. E. 519, 2 W. C. L. J. 230; *Behan v. Honor Co.*, 143 (La.), 78 So. 589, 2 W. C. L. J. 67; *Republic Iron & Steel Co., v. Markiewicz*, — Ind. App. —, (1921), 129 N. E. 710; *Glennon's Case*, —Mass. —, (1920), 128 N. E. 942, 7 W. C. L. J. 210.

Where an employee was at the time of his injury suffering from a tumor, which condition was aggravated by the injury he was nevertheless entitled to compensation.⁴⁰

Where an employee, engaged in baling scrap copper, was found dead near the baling press, with a completed bale of copper besides him, and an autopsy disclosed an acute hyperemia of the organs of the body and the heart somewhat enlarged, and it was contended that the employee's heavy work accelerated death on account of this condition, the court said: "In this case there was no evidence tending to prove any accident or accidental injury to the deceased. There was no mark on his person and nothing from which it could be inferred that an accident had occurred, and it is not claimed that there was an accident but only that the heavy work which he was doing in the ordinary course of his employment caused or hastened the death." Compensation was denied.⁴¹

It is sufficient to justify an award, if the accident, by weakening resistance, or otherwise, influences existing disease to cause death or disability.⁴²

Where excessive strain from overwork caused a break of an aneurism from which an employee was suffering, it was held to be a compensable accident.⁴³

Where it was claimed that latent tuberculosis germs which were in the system were caused to become active by an injury to the employee's hand, the court held the proof insufficient.⁴⁴

"Suppose the deceased did have an aneurism of the aorta, and while assisting in the lifting of the iron plate on Nov. 18th he fell and was found dead; it can reasonably be found, I think,

40. *Big Muddy Coal, etc., Co. v. Indus Bd.*, 279 Ill. 235, 116 N. E. 662; *Hartz v. Hartford Faience Co.*, 90 Conn. 539, 97 Atl. 1020; *In re Chas Carter*, 2nd A. R. U. S. C. C. 197. See Conn. Act, Am. 1921, § 5341.

41. *Jakub v. Indus Comm.*, 123 N. E. 263, 4 W. C. L. J. 153, 288 Ill. 87.

42. *Mailman v. Record F. & M. Co.*, 118 Me. 172, 106 Atl. 606, 4 W. C. L. J. 205. *Voorhees v. Smith*, 86 N. J. L. 500, 92 Atl. 280, 7 N. C. C. A. 646; *Trodden v. McLennard*, 4 B. W. C. C. 190; *Doughten v. Hickman*, 6 B. W. C. C. 77; *Puritan v. Wolfe*, (Ind. App.), 120 N. E. 417.

43. *Grove v. Michigan Paper Co.*, 184 Mich. 449, 151 N. W. 554.

44. *White v. Lanter*, 37 N. J. Law J. 175.

that the exertion of lifting the iron plate or assisting therein, was too much for his diseased, enfeebled or weakened condition, that it resulted in an accident to him, and that therefore, he should be entitled to compensation."⁴⁵

Where an employee was suffering from a sarcoma condition of the bone which condition was so aggravated by being struck by a piece of coal falling thereon, that it was necessary to amputate the leg, it was held to be a compensable accident.⁴⁶

Where a school principal who was suffering from arterio sclerosis was struck on the head by a basket ball and died therefrom and it was shown that he would have lived several years but for the accident, it was nevertheless held that his dependants were entitled to compensation.⁴⁷ Assuming that such disability is being prolonged by the disease, there is yet no point at which the consequences of the injury cease to operate. It is the theory of the respondents, not that the consequences of the injury cease, but that they are prolonged and extended. There is no part of the period of disability that would have happened or would have continued except for the injury. The consequences of the injury extend through the entire period, and so long as the incapacity of the employee for work results from the injury, it comes within the statute, even when prolonged by pre-existing disease."⁴⁸

Where an employee sustained an injury to his head and, due to a pre-existing constitutional disease known as syphilis, developed a condition of foris rendering him insane, it was held he was entitled to compensation.⁴⁹

"The disease, which the Commission finds existed prior to the accident, did not 'naturally and unavoidably result' from the acci-

45. *Winter v. Atkinson*, 37 N. J. L. J. 195, 11 N. C. C. A. 180, *Aff'd*, in 88 N. J. L. 401, 96 Atl. 360.

46. *Prokopick v. Buffalo Gas Co.*, 7 N. Y. St. Dep. Rep. 390.

47. *City of Milwaukee v. Industrial Comm.*, 160 Wis. 238, 151 N. W. 247.

48. *Hills v. Oval Wood Dish Co.*, 191 Mich. 411, 158 N. W. 214, 15 N. C. C. A. 649; *Blackburn v. Coffeyville Vitrified Brick & Tile Co.*, 1920, 193 Pac. 351, 7 W. C. L. J. 58.

49. *In re Crowley*, 223 Mass. 288, 111 N. E. 786, 15 N. C. C. A. 346; *Finkelday v. Henry Heide*, 183 N. Y. S. 912, 6 W. C. L. J. 565; *In re G. B. P.*, 3rd A. R. U. S. C. C. 155.

dent; it was there with all the potentiality of destruction to the eyesight when this accident occurred, and if we assume that the disease was aggravated by the accident, that it developed more rapidly than would otherwise have been the case, still the disease or infection was not the result of the accident, and it is only resulting disease or infection which is provided for by the law. The evidence before the Commission is undisputed that this disease had resulted in 'an atrophy or degeneration of the optic nerve,' and that 'such a condition is in consequence of a specific constitutional infection and is permanent with a tendency toward progression;' that the claimant had developed the symptoms of locomotor ataxia, and that the atrophy of the optic nerve predated the injury, and the only inference from the testimony is that the claimant was so far advanced in the disease that it was only a matter of a comparatively short time when he must have reached the results which now prevail, though no accident had happened. There is some slight testimony to the effect that the disease might have been aggravated or accelerated by reason of the degeneration of the tissues, lessening the claimant's power of resistance; but this does not tend to bring the case within the letter or the spirit of the statute, for no one has ever suggested that the results of specific constitutional infection, which in the present case are conceded to be congenital syphilis, constituted a legitimate charge upon the industrial life of the state.''⁵⁰

Where an employee has a cardiac lesion and aggravates this, through the unusual strain of bending heavy bars, which causes a sudden dilatation of the heart, resulting in death, such death is accidental.⁵¹ An employee having arterial sclerosis suffered paralysis as a result of heat and over-exertion. This was held to be an accident.⁵² An employee in lifting a can of paint burst a blood vessel in his lungs and died. This vessel had burst before and healed over but might burst again. This was held to be an acci-

50. *Borgstead v. Shults Bread Co.*, 180 App. Div. 229, 167 N. Y. S. 647, 1 W. C. L. J. 669, 15 N. C. C. A. 639.

51. *Uhl v. Guarantee Const. Co.*, 174 App. Div. 571, 161 N. Y. S. 659.

52. *La Veck v. Parke, etc., Co.*, 190 Mich. 604, 157 N. W. 72, L. R. A. 1916 D. 1277.

dental injury.⁵³ Where a fireman fell from an engine which caused a hemorrhage of the brain accelerated by a pre-existing syphilitic condition, the resultant death was held to be due to the accident.⁵⁴

The claimant suffered an injury arising out of and in the course of her employment, which aggravated and accelerated a weak heart condition to the point of total incapacity for work. It appeared that she had this "weak heart condition" prior to her injury and prior to entering the service of this employer. Affirming an award, the court said in part: "It has been argued with force on behalf of the insurer that since the harm to the employee was not wholly the effect of the work but came in large part from the previous weakened condition of the employee's heart, hence, either there can be no award of compensation, or it should be restricted to that part of the injury which resulted directly from the work, and the part of the injury which flowed from the previous condition should be excluded. Even though the premise be sound, the conclusion does not follow. The act makes no provision for any such analysis or apportionment. It protects the 'employee.' That word is defined in part 5, sec. 2, as including 'every person in the service of another under any contract of hire,' with exceptions not here pertinent. There is nothing said about the protection being confined to the healthy employee. The previous condition of health is of no consequence in determining the amount of relief to be afforded. It has no more to do with it than his lack of ordinary care or the employer's freedom from simple negligence. It is a most material circumstance to be considered and weighed in ascertaining whether the injury resulted from the work or from disease. It is the injury arising out of the employment and not out of disease of the employee for which compensation is to be made. Yet it is the hazard of the employment acting upon the particular employee in his condition of health and not what that hazard would be if acting upon a healthy employee

53. *Southwestern Surety Ins. Co. v. Owens*, (Tex. Civ. App.), 198 S. W. 662, 1 W. C. L. J. 271.

54. *Peoria H. etc., Co., v. Industrial Board*, 279 Ill. 352, 116 N. E. 651, 15 N. C. C. A., 632.

or upon the average employee. The act makes no distinction between wise or foolish, skilled or inexperienced, healthy or diseased employees. All who rightly are describable as employees come within the act. A high degree of discrimination must be exercised to determine whether the real cause of an injury is disease or the hazard of the employment. A disease which under any rational work is likely to progress so as finally to disable the employee, does not become a 'personal injury' under the act merely because it reaches the point of disablement while work for a subscriber is being pursued. It is only when there is a direct casual connection between the exertion of the employment and the injury that an award of compensation can be made. The substantial question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. In the former case, no award can be made; in the latter, it ought to be made." ⁵⁵

Where deceased, who suffered an inguinal hernia while laying terra cotta window sills, weighing 75 or 80 pounds each, had a prior structural weakness in the region where the injury occurred, compensation was properly awarded his widow. ⁵⁶

Deceased was suffering from an advanced aneurism of the aorta, and while engaged in tightening a nut with a spanner the strain caused a rupture of the aneurism, resulting in death. It was held that death resulted from personal injury by accident arising out of the employment, and compensation was awarded. Lord Loreburn, speaking for the House of Lords, said: "This man died from the rupture of an aneurism, and 'the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal.' Again, 'the aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion, or strain, would have been sufficient to bring about a rupture.' * * * I do not think we

55. In re Madden, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916 D 1000; In re Edward Johnston, 3rd A. R. U. S. C. C. 157; In re James Cronin, 3rd A. R. U. S. C. C. 157; In re Chas. E. Young, 3rd A. R. U. S. C. C. 158; In re Felix W. Mitz, 3rd A. R. U. S. C. C. 159.

56. Hurley v. Selden-Brech Const Co., 193 Mich. 197, 159 N. W. 311.

should attach any importance to the fact that there was no strain or exertion out of the ordinary. If the degree of exertion beyond what is usual had to be considered in these cases, there must be some standard of exertion, varying in every trade. Nor do I think we should attach any importance to the fact that this man's health was as described. If the state of his health had to be considered, there must be some standard of health, varying, I suppose, with men of different ages. An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health. It may be said, and was said, that if the Act admits of a claim in the present case, every one whose disease kills him while he is at work will be entitled to compensation. I do not think so, and for this reason. It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together? Looking at it broadly, I say, and free from over nice conjectures: Was it the disease that did it or did the work he was doing help in any material degree?⁵⁷

A fireman, after having been for some time at work shoveling coal and raking fires in the stokehold of a ship, had an apoplectic stroke. The medical evidence tended to prove that the man was in a diseased condition, and that such a stroke would be likely to be brought on by such exertion. The trial judge drew the inference that the injury was caused by accident within the meaning of the compensation act. On appeal it was held that there was evidence to support the inference.⁵⁸

57. *Clover, Clayton & Co. v. Hughes*, (1910), A. C. 242, 26 T. L. Rep. 359, 3 B. W. C. C. 275, 79 L. J. K. B. 470.

58. *Broforst v. Blomfield*, 6 B. W. C. C. 613.

"The weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who has died from a heat-stroke was by physical debility more likely than others so to suffer can have nothing to do with the question whether what befell him is to be regarded as an accident or not."⁵⁹

§ 139. **Aneurism.**—Decedent, while in defendant's employ, was at times required to put forth considerable physical effort causing, on one of these occasions, due to predisposing causes, an aneurism. It was held to be an accident arising out of and in the course of the employment.⁶⁰

Where an aneurism was found to be due to a continued strain of the employee's work, it was held not to be an accident arising out of the employment.⁶¹

Where an employee died from the rupture of an aneurism, six days after being thrown from a wagon and run over, it was held that the death was due to the accident.⁶²

Where a workman had an aneurism of the aorta, which was so far advanced that it was apt to burst at any time, and it did burst in the course of his employment, at a time when he was not exerting extraordinary strain, it was held to be a compensable accident under the English act.⁶³

Where a post mortem disclosed an aneurism of the aorta, and it was shown that deceased had strained himself three days before by heavy lifting and complained thereof to the time of death, it was held that the death was due to the accidental strain.⁶⁴

A blow on the left groin was held to have been the proximate cause of an aneurism.⁶⁵

59. *Ismay, Imrie & Co. v. Williamson*, 99 L. T. 595, (1908), A. C. 437,

24. T. L. Rep. 881, 1 B. W. C. C. 232, 52 Sol. Jo. 713, 42 Ir. L. A. 213.

60. *Haskell & Barker Car Co. v. Brown*, 64 Ind. App. —, 117 N. E. 555, 15. N. C. C. A. 641; *In re Geo. Hilderbrand*, 3rd A. R. U. S. C. C. 139.

61. *Paton v. William Dixon*, 6 B. W. C. C. 882.

62. *Martin v. City of Sacramento*, 2 Cal. I. A. C. 692; *Winter v. Atkinson Frizelle Co.* 37 N. J. L. J. 195, 11 N. C. C. A. 180.

63. *Clover Clayton & Co. v. Hughes*, 3 B. W. C. C. 275 H. L.

64. *Draper v. Lore & Co.*, 1 Cal. I. A. C. 132.

65. *McKenzie v. Pullman Co.*, 2 Cal. I. A. C. 984.

"It was found, on the post mortem, on undisputed evidence, that the death was due to rupture of an aneurism. It also appears that this is a disease which does not generally, and in this particular case did not, arise suddenly; it was probably of long standing. The artery was in a bad condition, but, as always happens, the moment came when the walls of the artery broke, and the blood came out, and death followed almost immediately. Now what is the necessary result of those facts, all of which I think are beyond contest and beyond dispute? In the first place, it seems to me that, within the definition given by the House of Lords on more than one occasion, of an accident, this was clearly an accident, and I cannot bring myself to doubt that it was an accident within the meaning of Lord Macnaghten's oft quoted and oft approved judgment in *Fenton v. Thorley & Co., Ltd.* (1903), A. C. 443; 5 W. C. C. 1, nor do I think there is any doubt that it was also an accident within the meaning of the judgment of the majority of the court in *Clover, Clayton & Co., Ltd., v. Hughes* (1910), A. C. 242; 3 B. W. C. C. 275. If it was an accident it is said that it still may not be an accident arising out of the employment. It may be that he was not doing anything at the time, or shortly before the time of death, which in any way could contribute to it or accelerate the fatal end. The artery must have been broken, the aneurism must have been ruptured, at some time, and in the natural course of events it would have been long distant. But we have, as it seems to me, to deal with the rupture of the aneurism at the particular time at which it was ruptured."⁶⁶

§ 140. **Anthrax.**—Where an employee contracted anthrax from handling hides, the germs entering a fissure on the back of his hand, caused by a previous handling of hides, the disability caused by the anthrax was held to be due to an accident.⁶⁷

Where anthrax bacilli alighted in the eye of a wool sorter, it was considered the same as if a spark from an anvil had struck

66. *McArdle v. Swansea Harbor Trust*, 8 B. W. C. C. 489, 11 N. C. C. A. 175.

67. *Helrs v. Hull & Co.*, 178 App. Div. 350, 164 N. Y. S. 767; *McCauley v. Imperial Wollen Co.*, 261 Pa. 312, 104 Atl. 617, 2 W. C. L. J. 932; *Henry v. G. Levor & Co.*, 6 N. Y. St. Dep. Rep. 388.

the eye and was held to be an accident arising out of the employment.⁶⁸

Where a gamekeeper handled an animal which a few days afterward died of anthrax and within a few days from the time of handling the animal, the gamekeeper died of the same disease, it was held not proven that there was an accident.⁶⁹

"When, however, death results from germ infection, to bring a case of this character within the act of 1915, the disease in question must be a sudden development from some such abrupt violence to the physical structure of the body as already indicated, and not the mere result of gradual development from long-continued exposure to natural dangers incident to the employment of the deceased person, as in cases of occupational diseases, the risks of which are voluntarily assumed. Here the anthrax germ, a distinguishable entity, came into actual contact with the deceased, thus gaining an entrance into his body, and his neck began to swell and discolor; therefore the complaint from which McCauley died can be traced to a certain time when there was a sudden or violent change in the condition of the physical structure of his body, just as though a serpent, concealed in the material upon which he was working had unexpectedly and suddenly bitten him. See *Heirs v. Hull & Co.*, 178 App. Div. 350, 352, 164 N. Y. Supp. 767."⁷⁰

Where there was no evidence as to whether hides such as those handled by deceased have anthrax bacteria, or as to the manner in which anthrax may be transmitted to men, it was error for the Industrial Commission to presume that an employee, who received a cut on his neck while not engaged in his duties, and died from anthrax while employed in a tannery, had received the injury in the course of his employment.⁷¹

68. *Higgins v. Campbell*, 1 K. B. 328.

69. *Sherwood v. Johnson*, 5 B. W. C. C. 686.

70. *McCauley v. Imperial Wollen Co. et al.*, 261 Pa. 312, 104 Atl. 617, 17 N. C. C. A. 864.

71. *Eldridge v. Endicott. Johnson & Co.*, —N. Y. App.—, (1920), 126 N. E. 254, 5 W. C. L. J. 716.

§ 141. **Appendicitis.**—In a case where a workman fell and injured his ankle, and after remaining in bed for a month, died of appendicitis peritonitis, and there was a conflict in the medical testimony as to whether the disease was caused by the accident, it was held that there was sufficient evidence that his death resulted from the accidental injury.⁷²

It was held that appendicitis resulting from a strain or heavy blow was an industrial injury.⁷³

Where a workman claimed that appendicitis resulted from a fall it was held that he had not proved that the injury arose out of the employment, and compensation was denied.⁷⁴

In an Ohio case, the commission said: "The question as to whether an injury may cause appendicitis to develop is largely a medical question. It is the opinion of the physicians who attended the decedent and who operated upon him for appendicitis that the injury was responsible for the disease from which he died. Our own Medical Department is just as positive that the death of decedent was not caused by the injury and it is stated that trauma has never been recognized by the medical profession as a possible cause for appendicitis. After giving all of the evidence submitted to us careful consideration, we conclude that the proof is not sufficient to establish the fact that appendicitis was caused by the injury. That the injury occurred and was followed more than a year thereafter by appendicitis does not prove that the one was the cause of the other. As nothing of a substantial nature has been offered in support of the theory that there is any causal connection between the two, we conclude that the proximate cause of the death of deceased was appendicitis."⁷⁵

72. *Enman v. Dalziel & Co.*, 6 B. W. C. C. 900 Ct. of Sess., 50 Scot. L. R. 143.

73. *McDonough v. Scott Company*, 3 Cal. I. A. C. 225; *Davis v. McDonald & Kahn*, 3 Cal. I. A. C. 84; *Lindquest v. Holler*, 178 App. Div. 317, 164 N. Y. S. 906; *Stolte v. N. Y. State Sewer Pipe Co.*, 179 App. Div. 949, 165 N. Y. S. 114.

74. *Dube v. Clayton Bros. Inc.*, 1 Conn. Comp. Dec. 441.

75. *In re Gardner*, 4 Ohio, 1. Comm. 21; *In re Geo. Bosley*, 3rd A. R. U. S. C. C. 106; *In re Earl W. Graham*, 2nd A. R. U. S. C. C. 144.

§ 142. **Apoplexy.**—An employee, while assisting another to lift a 200 pound barrel, was seized with a stroke of apoplexy, by reason of the unusual strain occasioned by the lifting. This was held to be a compensable accident.⁷⁶

“It is insisted that no ‘unexpected or unforeseen event, happening suddenly and violently’ occurred; that sickness arising from the placing of his body by plaintiff against the beams and surging back and forwards could not be said to be ‘an unforeseen event;’ and that it did not happen suddenly and violently except as it was produced by plaintiff himself. It is said that the language ‘was clearly meant to limit recoveries to accident such as the breaking of machinery, or the unexpected cutting or wounding employee’s person by some breaking or falling or exploding of apparatus, machinery or tools.’ To hold this would unduly limit the meaning of this clause (Neb. Rev. St. 1913, § 3693). The unforeseen event was the straining, weakening of lesion of the blood vessels of the brain or stomach, and this was an unforeseen event happening suddenly. It is also said that no ‘objective symptoms’ of an injury appeared at the time, and that these elements are essential. We agree with this argument so far that the accident must produce ‘at the time objective symptoms of an injury,’ but the difficulty is as to what constitutes objective symptoms. Defendant’s idea is that by objective symptoms are meant symptoms of an injury which can be seen, or ascertained by touch. We are of the opinion that the expression has a wider meaning, and that symptoms of pain and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly voluntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.”⁷⁷

It was held that where a stroke of apoplexy which may or may not have been brought on by a strain or over exertion, is not an in-

76. *Fowler v. Risedorph Bottling et. al.*, 175 N. Y. App. Div. 224, 161 N. Y. Supp. 535, 14 N. C. C. A. 533; *In re John Nymark*, 2nd A. R. U. S. C. C. 94.

77. *Manning v. Pomerene*, 101 Neb., 127, 162 N. W. 492.

jury suffered by accident, where there is no evidence that the work subjected the workman to any serious strain.⁷⁸

Where a ship's stoker was found in a condition of heat apoplexy near his work, it was held not to have been proved that his work caused his condition and that therefore it was not a compensable accident.⁷⁹

Where there has been no accidental injury which aggravates or brings on apoplexy, it is not accidental.⁸⁰

It was held that there was not sufficient proof of accident, where an injured workman died from a stroke of apoplexy a fortnight after he returned to work.⁸¹

A teamster accidentally fell from his wagon, receiving injuries to the left elbow and hip. He was taken to his home and put to bed without losing consciousness, but three hours after the accident he suffered an apoplectic stroke, resulting in paralysis, for which he applied for compensation. All the experts but one testified there was no connection between the fall and the stroke. Compensation was allowed.⁸²

In the opinion of the attending physician a thrombus or an embolism may have caused the death of a laborer who died suddenly in bed five or six months after an accident that had seriously injured his head and body. The Appellate Division affirmed an award to his family, unanimously and without opinion.⁸³

78. *Barnabas v. Bersham Colliery Co.*, 102 L. T. R. 621, 3 B. W. C. C. 216, 55 Sol. J. 63, 4 B. W. C. C. 119; *In re Thomas Cunningham*, 3rd A. R. U. S. C. C. 115; *Lesko v. Lehigh Valley Coal Co.*, — Pa. — (1921), 112 Atl. 768.

79. *In re John M. Cahill*, 3rd A. R. U. S. C. C. 105, *Olson v. Owners of S. S. "Dorsett,"* 6 B. W. C. C. 658; *In re Wm. Walker*, 3rd. A. R. U. S. C. C. 115.

80. *Ledoux v. Employer's Liability Assur. Corp.*, 2 Mass. I. A. Bd. 493.

81. *Warnock v. Glasgow Iron & Steel Co. Ltd.*, 6 F., 474 Ct. of Sess.

82. *Selaya v. Ruthven & Cerrano*, 5 Cal. I. A. C. 238; *State ex rel. Geo. D. Taylor & Sons v. District Court of Ramsey Co.*, — Minn. — (1921), 179 N. W. 217, 6 W. C. L. J. 698.

83. *Judice v. Degnon, Constructing Co.* 181 N. Y. App. Div. 909; 167 N. Y. S. 1107. *Casey v. Borden's Condensed Milk Co.*, 182 N. Y. App. Div. 907, 168 N. Y. S. 1104.

§ 143. **Artery Rupture.**—Deceased was always regarded as a strong healthy man and worked regularly, except occasionally when he indulged in liquor to excess. While pushing a mine car up grade he complained of his side, and died three hours thereafter of a rupture of the aorta. A diseased condition existed at the place of rupture as shown by its unnatural thinness. It was held to be a personal injury by accident, as it hastened to a fatal termination an ailment; and this even under the rule requiring that a definite occurrence must be indentified in order that a certain injury may be said to be accidental.⁸⁴ A laborer became ill while at work and died the same day. An autopsy disclosed a rupture of the aortic artery. Compensation was claimed on the theory that the aneurism was caused or aggravated by an injury which the deceased had sustained five days previous. It was held that the claimant did not prove this, and that indications were that the aneurism was due to disease rather than injury.⁸⁵ In connection with this case it must be remembered that the word "accident" is not used in the Massachusetts Act.

A quarry laborer using a sixteen pound sledge suffered a pulmonary hemorrhage from which he died before medical aid could reach him. "The evidence warranted a finding that the physical structure of the man gave way under the stress of his usual labor. He certainly did not intend to kill himself by breaking rock and loading cars at a price per car. He did not know or in any event was inattentive to the limited power of his blood vessels to resist blood pressure aggravated by vigorous muscular effort, out of this ignorance or miscalculation of forces came misadventure, and the term accident applies to what happened to him."⁸⁶

Where an employee died in the course of his employment from a rupture of the aorta, caused by "an extra effort in vomiting,"

84. *Indian Creek Coal & Mining Co. v. Calvert*, (Ind. App.) 119 N. E. 519 (1918), 2 W. C. L. J. 230; *Southwestern Surety Ins. Co. v. Owens*, — Tex. Civ. App. —, 198 S. W. 662, 1 W. C. L. J. 271.

85. *In re Knight*, 231 Mass. 142, 120 N. E. 395 (1918).

86. *Gilliland et al., v. Ash Grove Lime & P. C. Co.*, 104 Kan. 771, 180 Pac. 793, 4 W. C. L. J. 187.

brought on by conditions arising in the employment, a claimant, irrespective of anterior causes, or pre-existing condition, was entitled to compensation, as the rupture itself occurring from such effort would constitute accidental "violence to the physical structure of the body."⁸⁷

An employee while working in a lumber yard moved quickly in order to avoid being struck by a fall, and in doing so made a sudden backward movement of his head which caused him considerable pain. The following day paralysis resulted, and he died later. An autopsy revealed that the death was due to glioma or brain tumor which is not of accidental origin. Therefore the contention that death was due to a rupture of a cerebral blood vessel was overruled.⁸⁸

"In the instant case all the characteristics of an accident were present. The occurrence was sudden, unexpected, and undesigned by the workman. The circumstances were clearly such that the commission was justified in finding that the hemorrhage was due to blood pressure intensified by vigorous muscular exertion. Relating the hemorrhage to physical exertion, rupture of the aorta by force from within was as distinctly traumatic as if the canal had been severed by violent application of a sharp instrument from without. There was no direct evidence of extraordinary exertion suddenly displayed. When last observed before the hemorrhage, the deceased was working in the manner habitual to his employment. The fact remains however, that an extraordinary and unforeseen thing suddenly and unpremeditatedly occurred, and the presence of all essential attributes of accident cannot be gainsaid. There was ample evidence in the record to justify the finding of the Industrial Commission that the deceased came to his death by accident, and the circuit court therefore properly confirmed the award. *Peoria Terminal Co. v. Industrial Board*, 279 Ill. 352, 116 N. E. 651; *Western Electric Co. v. Industrial Com.*,

87. *Clark v. Lehigh Valley Coal Co.*, 264 Pa. 529, 107 Atl. 858, 4 W. C. L. J. 747.

88. *Babo v. Blinn Lumber Co.*, 1 Cal. I. A. C. Dec. (1914) 45, 7 N. C. C. A. 651; *Barnabas v. Bersham Colliery Co.*, 103 L. T. 513, 55 Sol. J. 63, 4 B. W. C. C. 119, 7 N. C. C. A. 652.

285 Ill. 279, 120 N. E. 774. In *Schroetke v. Jackson-Church Co.*, 193 Mich. 616, 160 N. W. 383, L. R. A. 1917D, 64.⁸⁹

§ 144. **Arterio-Sclerosis.**—It was held that where the evidence as to whether an employee's disability arose out of an injury he had sustained was conflicting, but there was sufficient evidence to sustain the finding of the district court that it did; the finding was not disturbed on appeal, although there was testimony by two physicians that the employee's condition was the result of progressive arterio-sclerosis.⁹⁰

"Either the alleged heat prostration caused the cerebral hemorrhage or it was the result of hardening of the arteries, and may have been superinduced by the heat prostration, we cannot say that either of said propositions has been established by a preponderance of the evidence. If an inference favorable to the applicant can only be arrived at by guess, the applicant fails."⁹¹

Compensation was denied on the ground that the workman's death may have been due to arterio-sclerosis existing prior to the injury.⁹² But where an accident aggravated a pre-existing condition of multiple sclerosis compensation was allowed.⁹³

While the evidence showed that the employee at the time and for two years prior to the accident had been suffering from arterio-sclerosis, it was held that the strain upon the arteries caused by over exertion and excessive heat resulted in the rupture of a blood vessel in the brain, causing paralysis.⁹⁴

Where a workman suffered from vertigo after an accident, it was held to be due to a pre-existing condition of arterio-sclerosis, and not to the accident.⁹⁵

89. *E. Baggot Co. v. Indus Comm.*, —Ill. —, 125 N. E. 254, 5 W. C. L. J. 202.

90. *Manning v. Pomerene*, 101 Neb. 127, 162 N. W. 492.

91. *Stinnette v. Ghlispie Co.*, Second Rep. Ky. Leading Dec. p. 5.

92. *Tucillo v. Ward Baking Co.*, 180 App. Div. 302, 167 N. Y. Supp. 666, 15 N. C. C. A. 638.

93. *Blackburn v. Coffeyville Vitrified Brick & Tile Co.*, — Kan. — (1920), 193 Pac. 351, 7 W. C. L. J. 58.

94. *La Veck v. Park Davis & Co.*, 190 Mich. 604, 157 N. W. 72, L. R. A. 1916 D. 1277.

95. *Carter v. Llewellyn Iron Wks.*, 2 Cal. I. A. C. D. 971.

Where it does not appear that a cerebral hemorrhage is due to an unusual strain or effort in the course of the employment but rather to pre-existing arterio-sclerosis, compensation will be denied.⁹⁶

Compensation was awarded where an accident was followed by arterio-sclerosis and other disabling conditions.⁹⁷

Where one physician testified that dilation of the heart and arterio-sclerosis was caused by the accident, and the expert appointed by the commission was unable to state whether it was or not, compensation was awarded.⁹⁸

§ 145. **Artificial Limb Broken.**—The breaking of an artificial limb is not an accident within the meaning of the compensation act.⁹⁹

The repair of an artificial limb which was furnished to the employee, by the commission, is a valid claim under the Federal Act.¹ The California Act was amended in 1921 to include artificial members § 3 [4].

§ 146. **Artificial Teeth Broken.**—It has been held that the breaking of artificial teeth firmly attached to natural roots is a personal injury.²

§ 147. **Artificial Eye Broken.**—The breaking of an artificial eye is not a compensable accident,³ neither is the breaking of an eyeglass, as a result of a fall, a personal injury.⁴

§ 148. **Asphyxiation.**—Claimant's decedent was discovered in an unconscious condition near a stopcock from which gas was

96. In re Mrs. Alfred Haries, Vol. 1, No. 7, Bul Ohio I. C. 101.

97. Rouda & Spick v. Heenan, 3 Cal. I. A. C. D. 36.

98. Welch v. C. F. Weber & Co., 2 Cal. I. A. C. 693; Fowler v. Risedorph Bottling Co., 175 App. Div. 224, 161 N. Y. Supp. 535.

99. Re Eulogio Rodriguez Op. Sol. Dep. C. & L., p. 189.

1. In re Alonzo N. Babcock, 2nd A. R. U. S. C. C. 234.

2. Robinson v. Glendale Hardware Co., 3 Cal. I. A. C. 376.

3. In re Christian W. Honold 2nd A. R. U. S. C. C. 232.

4. In re Sadie M. Miller, 3rd A. R. U. S. C. C. 171.

escaping. It was his duty to open the stopcock daily. In affirming an award in claimant's favor the court said: "If the owner of an automobile was found unconscious in his closed garage, with the engine to his car running, would not one familiar with like situations at once say he had been overcome by inhaling the exhaust from the engine? The inferences to be drawn from the circumstances in the instant case are of like kind to that drawn in the suppositious case, though perhaps differing in degree."⁵

Where a workman was found dead from asphyxiation in a room with doors locked and gas cock open, it was held not to have been proved that the death was due to an accident that arose out of the employment.⁶

Where two employees were found dead from asphyxiation in a wine tank, the commission found that the evidence was insufficient to establish wilful misconduct in the violation of a rule and awarded compensation.⁷

Death by asphyxiation while working in a mine is an accident within the meaning of the compensation act.⁸

§ 149. **Assaults.**—The accidental shooting of a salesman, who had accompanied a local dealer on an auto trip, by a posse, who had mistaken the occupants for auto thieves was held to be an accidental injury arising out of the employment. The court said: "The finding that the injury to Wold was accidental must be sustained, for there is no evidence that any of the shooters intended to hit the occupants of the car. At most they purposed to puncture the tires so as to recover the car or apprehend the supposed criminals in charge of it."⁹

5. *Holnagle v. Lansing Fuel & Gas Co.*, 200 Mich. 132, 166 N. W. 843.

6. *Gray v. Sopwith Aviation Co.*, 119 L. T. R. 194.

7. *United States F. & G. Co. v. Industrial Acc. Com. of Cal.* 163 Pac. 1013, 15 N. C. C. A. 150; *Coady v. Igo*, 91 Conn. 54, 98 Atl. 328, 15 N. C. C. A. 457.

8. *Larr v. Hecla Coal & Coke C.*, —Pa.— (1920), 109 Atl. 224, 5 W. C. L. J. 904.

9. *Wold v. Chevrolet Motor Co.*, —Minn.— (1920), 179 N. W. 219, 6 W. C. L. J. 699.

Injury resulting to an employee while at work in the master's business, when assaulted by a fellow employee is "an accidental personal injury arising out of the employment" within the meaning of that term as used in the Oklahoma Compensation Act.¹⁰

§ 150. **Asthma.**—Where an employee suffered from asthma and heart trouble as a result of breathing dust which he stirred up in his work, it was held that the disability was not due to an accident and compensation was denied.¹¹

§ 151. **Bends.**—Where an employee sustained "Bends" which is in the nature of a rupture of internal organs, due to the release of the compressed air under which the employee was working, it was held to be an accidental injury and compensable.¹²

§ 152. **Blood Poison.**—"The evidence is quite satisfactory that the blood poisoning and the ensuing death were the result of the scratch. The medical testimony is to that effect and the sequence of events leaves very little doubt on that point. That the scratch was received while he was engaged in his employment is not so clear. There was no direct evidence that the scratch was so received. We think, however, the evidence is sufficient. The fact that deceased had no scratch when he left home in the morning and had one when he came home from work at night, that he must have come home immediately, for he was home within half an hour of the time he quit work, that the scratch had blood upon it which had hardened, indicating that the scratch had been received earlier than the time he quit work, that it was such a scratch as he was not likely to receive on a trip from his work to his home, and such a scratch as he might well have received while at work, these facts taken in connection with the letter above quoted, which is of some force as an admission, were such that the court might infer that the scratch was received

10. *Stasmos v. State Indus. Comm.*, — Okla. — (1921), 195 Pac. 762.

11. *Wetherle v. American Hardware Corp.*, 1 Conn. Comp. Dec. 367.

12. *Re Wm. Murray*, Op. Sol. Dep. C. & L., p. 201.

while deceased was in the course of his usual work and that it arose out of it."¹³

Where blood poisoning results from accidental injury it is compensable.¹⁴

"We perceive no merit in the claim that this disability was not proximately caused by the injury and abrasion of the skin. Such results do ensue from such abrasions, and they are brought about by the operation of what are ordinarily considered natural forces; that is, by the intervention of infectious germs usually, or at least frequently, present in the air or on the surface of substances with which any person may come in contact, and which are invisible to the eye and imperceptible to the senses."¹⁵

Where an employee was injured, and, by reason of lying in bed for a long time, developed a bed sore from which blood poisoning developed and caused his death, it was held that the accident and not the blood poisoning was the proximate cause of death.¹⁶

An employee engaged in a boxing match and aggravated an old wound, received in the course of employment, which had practically healed. It was held that the blood poisoning which resulted from the aggravation, and caused a permanent disability, was the proximate cause of the permanent disability, and compensation therefor was denied.¹⁷

While a miner was at work hewing coal a piece of coal worked its way into his knee, causing blood poisoning. This was held to be an injury resulting from accident.¹⁸

A cake of ice broke loose while being hauled up a shute and struck the employee on the leg breaking it. Two weeks thereafter while the employee was in the hospital, blood poisoning set in,

13. *Rackman v. Albert Dickson Co.*, 139 Minn. 30, 165 N. W. 478, 1 W. C. L. J. 422.

14. *Fleet v. Johnson*, 6 B. W. C. C. 60; *Burns case*, 218 Mass. 8, 105 N. E. 601, 5 N. C. C. A. 635; *White v. Ford Motor Co.*, W. C. & Ins. Rep. 25 (1918), 17 N. C. C. A. 93.

15. *Great Western Power Co. v. Pillsbury et al.*, 171 Cal. 69, 151 Pac. 1136, L. R. A. 1916 A. 281, 11 N. C. C. A. 493. See *Infection*.

16. *Burns Case* 218 Mass. 8, 105 N. E. 601.

17. *Kill v. Industrial Commission*, 160 Wis. 549, 152 N. W. 148.

18. *Thompson v. Ashington Coal Co.*, 84 L. T. N. S. 412, 17 Times L. R. 345.

causing death. The commission said: "The injury was not the sole and proximate cause of death, but was the exciting and contributory cause, and there is a direct causal connection between the injury and the death."¹⁹

Where an employee was troubled with pimples, and upon his request a fellow employee opened a pimple in an unsanitary manner, and blood-poison resulted it can not be said that such an injury resulted from an accident.²⁰

§ 153. **Blood Vessel Rupture.**—A workman stood in a crouching position using a 20 pound sledge for an hour and a half, at the conclusion of which he accidentally fell, his head striking a piece of granite, cutting a large gash over his eye. The doctor testified that the severe strain and falling on the rock caused cerebral hemorrhage. It was held to be an accident "arising out of and in the course of the employment."²¹

A traveling salesman ran to catch a train, after which he suffered from dizziness and paralysis, caused by a breaking of a blood vessel in his brain. This was held to be a compensable accident.²²

An employee, while lifting a heavy weight, suffered a rupture to a blood vessel, and the blood filtered through to the abdominal cavity, causing death. This was held to be a compensable injury.²³

Where a collier, while doing heavy work in building a pack, was suddenly seized with apoplexy and died, there was evidence that his arteries were greatly degenerated and they might have

19. *Coffee v. Bordens Condensed Milk Co.*, 1 Conn. Comp. Dec. 167.

20. *Rombellow v. Marin County Milk Producers*, 1 Cal. I. A. C. (Part 2), 87.

Note: For further cases, see same title under the chapter on, "Arising Out Of," also "Infection," "Abrasions" and "Friction Injuries." See 11 N. C. C. A. 493.

21. *State v. District Court of Sterns Co.*, 137 Minn. 318, 163 N. W. 667. 14 N. C. C. A. 527.

22. *Crosby v. Thorp-Hawley Co. et al.*, 206 Mich. 250, 172 N. W. 535. 4 W. C. L. J. 245 (1919); *Schroethe v. Jackson-Church Co.*, 193 Mich. 616, 160 N. W. 383; *Clark v. Lehigh Valley Coal Co.*, —Pa.—, 107 Atl. 858, 4 W. C. L. J. 747.

23. *Greenberg v. New Leather Goods Co.*, (1916) 3 Cal. I. A. C. 328.

ruptured with or without a strain. The court held that, as the evidence was equally consistent with an accident having happened or not happened, the burden of proving an accident had not been discharged.²⁴

Where an employee was cranking a coal delivery wagon, and the strain from turning the crank caused a small blood vessel to break in the pial membrane of the brain, it was held to be an accidental injury.²⁵

Where an employe, whose duties required great muscular strain and exertion, burst a blood vessel, causing death, it was held that the death was due to an accident.²⁶

Paralysis resulting from rupture of a blood vessel, due to heat and over exertion by an employee having arterial sclerosis, is an accident, within the Michigan Act.²⁷

Where lifting a can of paint caused a blood vessel in a servant's lungs to burst, there was an accidental injury, and it is immaterial that it had burst before, but had healed over, and might burst again.²⁸

Where an employee was required to lift a piano over the step of a stairway the court held that the unusual lifting and straining, exertion and apprehension, by reason of the lack of experienced help, constituted an accident, and a blood vessel rupture resulting therefrom was compensable.²⁹

§ 154. **Boils.**—Where a dishwasher suffered from boils, but there was no evidence of cuts, scratches, or bruises, or other accident causing such disability, it was held not to be compensable.³⁰

24. *Barnabas v. Bersham Colliery Co.*, 103 L. T. 513, 55 Sol. J. 63, 4 B. W. C. C. 119, 7 N. C. C. A. 651.

25. *Farrell v. Casualty Co. of America*, 2 Mass. Wkm. C. C. 423; *Patrick v. J. B. Ham Co.*, — Me. — (1921), 111 Atl. 912.

26. *State v. District Court*, 137 Minn. 30, 162 N. W. 678.

27. *La Veck v. Park Davis & Co.*, 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D, 1277, 14 N. C. C. A. 141.

28. *Southwestern Surety Ins. Co. v. Owens*, (Tex. Civ. App.), 198 S. W. 662, 1 W. C. L. J. 271.

29. *St. Clair v. A. H. Meyer Music House*, — Mich. — (1920), 178 N. W. 705, 6 W. C. L. J. 540.

30. *Rolph v. Morgan*, 2 Cal. I. A. C. 543, 11 N. C. C. A. 500.

Where death resulted from meningitis caused by a series of boils, which developed some months after the amputation of a toe, made necessary as a result of an industrial accident, it was held that the accident causing the loss of the toe was not the proximate cause of the death, and compensation was denied.³¹

§ 155. **Brass Poisoning.**—Brass poisoning is a compensable injury under the Federal Act when contracted while in the performance of the employee's duties.³²

§ 156. **Bright's Disease.**—Where a passenger, who had been suffering from chronic Bright's disease and a valvular disease of the heart, dropped dead about twenty hours after the derailment of a car on which he had been riding, it was held to be a question for the jury as to whether the accident was the cause of the death.³³

Where plaintiff fell while carrying a package of mirrors which fell on him, the court held that the evidence showed with at least sufficient probability that Bright's disease resulted from the injuries to render it admissible for the consideration of the jury. Judgment for plaintiff was affirmed.³⁴

Where an employee was injured by a fall, and five days later a condition of acute Bright's disease developed, but there was no evidence of physical injuries to the kidneys, and the medical testimony was to the effect that Bright's disease is probably never of traumatic origin, compensation was denied.³⁵

Where an employee suffered a strain while pulling a bale of bur-lap and later became incapacitated for work because of a condition of Bright's disease, it was held there was no connection between the strain and the disease, and compensation was denied.³⁶

Where an employee's foot became infected from a blister, caused by the rubbing of boots furnished by the employer, and the medical

31. *Stephens v. Clarke*, 2 Cal. I. A. C. 135, 11 N. C. C. A. 715.

32. *In re Robert E. Hanna*, 2nd A. R. U. S. C. C. 152.

33. *Jones v. Public Service Ry. Co.*, 86 N. J. L. 646, 92 Atl. 397.

34. *Houston & T. C. R. Co. v. Gerald*, 60 Tex. Civ. App. 151, 128 S. W. 166, 15 N. C. C. A. 550.

35. *Husvisk v. Simms*, 1 Cal. I. A. C. 266.

36. *Lima v. Aetna Life Insur. Co.* 2 Mass. Wk. Comp. Cases, 800

testimony was to the effect that the injury and infection of the heel had poisoned the blood stream and caused Brights disease, the disease was incidental to the injury, and the chain of causation was complete from injury to death.³⁷

§ 157. **Bronchitis.**—Where acute bronchitis and lead poisoning was contracted by an employee as a result of the inhalation of gas fumes from an oxyacetylene burning machine, this was held to be a personal injury under the Federal Act. But it must be borne in mind that under that act the injury need not be caused by accident.³⁸

Where a workman suffered an injury from whose immediate effects he recovered, but which left him in such weakened condition that he contracted influenza and died of bronchitis thirteen months after the accident, it was held that the death resulted from the accident.³⁹

Where an employee was injured by a fall and later contracted bronchitis and intestinal tuberculosis it was held that there was no causal connection between the accidental injury and the disease and compensation was denied.⁴⁰

§ 158. **Burns.**—Compensation was allowed for burns received in the course of the employee's employment.⁴¹

A stenographer, employed by a corporation on the fourth floor of a building was burned to death when a fire, starting on one of the lower floors cut off her means of escape. Compensation was awarded for accidental death arising out of and in the course of the employment.⁴²

Where a workman employed as a molder received some slight burns on his arm, and ten days later erysipelas developed at the

37. *Wheadon v. Red River Lumber Co.*, 1 Cal. I. A. C. 640.

38. *In re Arato Op. Sal. Dep. of L.* 264; *In re Geo. J. Endres*, 3rd A. R. U. S. C. C. 112.

39. *Thoburn v. Bedlington Coal Co.*, 5 B. W. C. C. 128.

40. *Swartz v. Casualty Co. of America*, 2 Mass. I. A. Bd. 728.

41. *Revita v. Royal Indemnity Co.*, 2 Mass. W. C. C. 352; *Keane v. Employer's Liability Assur. Corp.* 1 Mass. W. C. C. 193.

42. *Newark Hair, etc., Co. v. Fieldman*, 89 N. J. L. 504, 99 Atl. 602.

site of the injuries and caused death, the death was held accidental and compensable.⁴³

Where a baker sustained burns to his hands and arms as a result of an explosion of natural gas, which was due to the negligence of a fireman of the bakery oven, his injuries resulted from an accident within the meaning of the workmen's Compensation Act.⁴⁴

§ 159. **Cancer.**—Applicant, while engaged as a workman, fell. He made claim for compensation for disability occasioned by sarcoma or cancer on his left clavicle which he contended was the result of the fall. Applicant, his wife, and other witnesses testified to the presence, three or four hours after the accident, of a lump on the clavicle at the point where, at the time of the hearing, nearly all of the experts testified there was a sarcoma. An x-ray picture, taken of the clavicle three days after the fall, showed it to be in normal condition, though the physician testified that it was sensitive and tender. The court affirmed the award, holding that, as the evidence was conflicting, the award would not be disturbed.⁴⁵

"The plaintiff was sound in limb and body prior to the accident. No appearance or symptom of cancer was present prior thereto, the malignant growth developed at the seat of the injury. After the injury plaintiff was unable to resume work. It is true that the cause of cancer cannot always be determined, but from the evidence in this case the proper conclusion is that the injury was the exciting cause of the cancer which resulted in the loss of plaintiff's leg." Compensation was awarded.⁴⁶

Cancer was held to be due to an injury suffered in a railroad accident.⁴⁷

43. Vol. 4, Bull. Ohio. I. C. 129.

44. *Adams v. Iten Biscuit Co.*, —Okla.—, 162 Pac. 938, B. 1 W. C. L. J. 1480.

45. *Sugar Co. of Santa Ana v. Industrial Acc. Comm.*, 35 Cal. App. 652, 170 Pac. 630 (1918).

46. *Partin v. Union Tanning Co.*, 2d. Rep. Ky. L. Dec. 110; *In re John Miller*, 2nd. A. R. U. S. C. C. 97.

47. *Shaw v. Chicago, R. I. & P. R. Co.*, 173 Ill. App. 107, 5 N. C. C. A. 780.

Where it is uncertain whether death was due to an injury or pre-existing cancer the jury will not be permitted to speculate thereon.⁴⁸

Where an employee, pricked his tongue with a tack which he held in his mouth while putting up window shades, and thereafter a cancer developed at said point, necessitating an operation, from which he died, it was held that the death was due to the accidental injury.⁴⁹

The fact that death from an accidental injury may be hastened by pre-existing cancer, does not deprive the dependent of compensation for the death.⁵⁰

Where an employee fell across a hot pipe, inflicting injuries which disabled him for a few days, and six or seven month later a cancer developed which required a series of operations, compensation was awarded.⁵¹

Where an employee while, pushing a post with his abdomen, suffered a rupture of an internal cancer and died, the death was held to be accidental.⁵²

Where an accidental blow inflamed a cancer, obstructing the ducts of the gall bladder and liver, causing death, the accidental blow was held to be the proximate cause of the death.⁵³

Where an employee claimed to have slipped and injured his leg 24 hours before he was found to have cancer of the bone and there was no discernible bruise, it was held that it had not been established that the accident was the cause of the disease.⁵⁴

Where a workman was incapacitated for three months by being struck in the back, and he died from the after effect of an operation for cancer, the medical testimony being conflicting as to the origin

48. *Malvern Lumber Co. v. Sweeney*, 116 Ark. 561, 172 S. W. 821, 8 N. C. C. A. 972; *In re Wm H. Cocklin*, 3rd. A R. U. S. C C. 114.

49. *Cramer v. Littell*, 38 N. J. L. J. 82.

50. *Blatt v. Schonberger & Noble*, 7 N. Y. S. D. R. 388.

51. *Richardson v. Builder's Exchange Assn.*, 9 N. Y. St. D. R. 317.

52. *Voorhees v. Smith Schoonmaker Co.*, 86 N. J. L. 500, 92 Atl. 280.

53. *Rose v. City of Los Angeles*, 2 Cal. I. A. C. D. 551.

54. *Narcotone v. The Charles Francis Press*, *The Bull. N. Y.* Vol. 1, No. 12, p. 16.

of the cancer, it was held that the evidence was sufficient to support a finding that death resulted from the injury.⁵⁵

Where gastric cancer followed an injury, but no evidence was produced to show that cancer was caused by the injury, compensation was denied.⁵⁶

Where a condition of malignant cancer termed carcinoma was aggravated by an injury and about seven months thereafter resulted in death the death was held to be due to the original injury and compensable.⁵⁷

§ 160. **Carbuncle.**—It was claimed that a carbuncle which affected the spine causing extended disability, resulted from an accidental blow on the employee's back, "According to medical science carbuncles are not associated with germs introduced from without but generally, if not always, come from internal poisoning, accompanying a run down condition of the system which existed in the case of this man. There is at least a very strong probability that this carbuncle, appearing in the usual place upon the body came as a result of some of those causes which generally produce carbuncles and not from anything which occurred in connection with the employment..'' Claim dismissed.⁵⁸

§ 161. **Cellulitis.**—Where Cellulitis of the joints of the finger developed as a result of a partial amputation, made necessary by an accidental injury, such disability is, compensable.⁵⁹

Cellulitis of the knee, caused by a traumatic injury, is a compensable injury.⁶⁰

55. *Lewis v. Port of London, Authority* 7 B. W. C. C. 577 C. A.

56. *McElligott v. Frankford General Insurance Co.*, 2 Mass. Ind. Acc. Bd. 521.

57. *Whittle v. National Aniline & Chemical Co.*, —Pa.— (1920), 109 Atl. 847, 6 W. C. L. J. 103.

58. *Redmond v. Winchester Repeating Arms Co.*, 2 Conn. C. D. Part 1, p. 118; *Throm v. Estate of Malley*, 2 Conn. C. D. Part 1, p. 121.

59. *Feinman v. Albert Mfg. Co.*, 155 N. Y. Supp. 909, 170 App. Div. 147.

60. *In re Harry Lee*, 2nd. A. R. U. S. C. C. 98.

§ 162. **Cerebral Abscess.**—Where an employee died of cerebral abscess compensation was denied on the ground that there was no proof that the abscess was of traumatic origin.⁶¹

§ 163. **Cerebral Hemorrhage.**—Where a fireman fell from an engine, which caused a hemorrhage of the brain, accelerated by a pre-existing syphilitic condition, the resultant death was due to the accident.⁶²

An employee having arterial sclerosis suffered a cerebral hemorrhage as a result of heat and over exertion. This was held to be a compensable accident.⁶³

Where an employee fell from a wagon, but there was no evidence as to what caused the fall, and he was found in an unconscious condition and died soon thereafter from cerebral hemorrhage, the court, in reversing the award of the board, said: "The board in the determination of questions of fact is permitted to draw such inferences from the evidence and all the circumstances as a reasonable man could draw, but its findings can not properly be based upon mere conjecture."⁶⁴

A miner was struck on the head by a mine prop, but worked for eight days thereafter, when he was taken to the hospital suffering from paralysis of the leg and arm and a pain in his head, and a portion of the skull removed was dark and discolored. The evidence was held sufficient to sustain the finding that the disability was due to cerebral hemorrhage resulting from the accident.⁶⁵

Where an employee, engaged in a hazardous employment, suffered a cerebral hemorrhage, as the result of unusual strain, it was held to be a compensable accidental injury.⁶⁶

61. *Judson v. San Francisco Warehouse Co.*, 2 Cal. I. A. C. 677.

62. *Peoria R. etc., Co., v. Industrial Board*, 279 Ill. 352, 116 N. E. 651.

63. *La Veck v. Park etc. Co.*, 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D 1277.

64. *In re Sanderson*, 224 Mass. 558, 113 N. E. 355, 14 N. C. C. A. 141; *In re Thomas Cunningham*, 3rd. A. R. U. S. C. C. 115.

65. *Frey v. Kernes Donnewald Coal Co.*, 277 Ill. 121, 110 N. E. 824.

66. *Fowler v. Risedorph Bottling Co.*, 175 App. Div. 224, 161 N. Y. S. 535; *In re O. E. Pasco*, 3rd A. R. U. S. C. C. 117; *In re Cornelius R. Morris*, 3rd A. R. U. S. C. C. 117.

A cerebral hemorrhage which is not the result of an accidental injury does not entitle an employee to compensation.⁶⁷

Cerebral hemorrhage not occasioned or contributed to in any way by unusual effort or strain or traumatism is not an injury, within the meaning of the Ohio Act.⁶⁸

Where a mine employee inhaled carbon dioxide gas commonly known among miners as black damp, as a result of which he sustained a cerebral hemorrhage, which caused his death, it was held to be a personal injury by accident.⁶⁹

Where an employee died of cerebral hemorrhage brought on by over exertion from chasing thieves, who were attempting to steal the employer's property, his death was held to have been caused by an injury, and compensation was awarded.⁷⁰

Where a workman fell and struck his head, and was rendered unconscious for half an hour, but was not incapacitated thereafter, but three weeks thereafter suffered a stroke of paralysis and died of cerebral hemorrhage, it was held that the death was not proximately caused by the fall.⁷¹

Where an employee was found on the floor frothing at the mouth, and next day died of blood clot on the brain, the court found that the award, founded upon said facts alone, was based on guess work and conjecture, and should therefore be reversed.⁷²

§ 164. **Cerebral Oedema.**—It was held that cerebral oedema and delirium tremens, causing the death of the driver of an automobile

67. *Birnie v. Contractor's Mutual Liability Ins. Co.*, 2 Mass. I. A. Bd., 619; *In re John W. Powell*, 3rd A. R. U. S. C. C. 116; *In re Wm. Walker*, 3rd. A. R. U. S. C. C. 115

68. *In re Beck* Vol. 4, Ind. C. of Ohio 107.

69. *Giacobbia v. Kerens-Donnewald Coal Co.*, Ill. I. Bd. 10 N. C. C. A. 261; *Kelly v. Auchenlea Coal Co.*, 4 B. W. C. C. 417; *In re Ellis* Vol. 4, Ind. C. of Ohio 150.

70. *In re Ellen Fair*, Vol. 1, No. 7, Bul. Ohio I. C. 83.

71. *McAdoo v. Cudahy Packing Co.*, 2 Cal. I. A. C. 500, see also *apoplexy*.

72. *Hansen v. Turner Const. Co.*, 224 N. Y. 331, 120 N. E. 693, 17 N. C. C. A. 787.

truck, was the natural result of a fractured wrist and lacerations of the face and scalp suffered while cranking the engine.⁷³

§ 165. **Colds.**—Colds resulting from ordinary exposure are “not due to an injury sustained while in the performance of duty” within the meaning of the Federal Act and therefore not compensable.⁷⁴

§ 166. **Concussion of Brain.**—Where a traveling salesman, after getting off a ferry boat, fell as a result of dizziness, striking his head and causing concussion of the brain compensation was denied on the ground that there was no evidence tending to connect the cause of the fall with a risk incidental to or arising out of the work being performed.⁷⁵

Where a workman was found lying at the bottom of a stair, which he used in doing his work, and was unconscious and suffering from concussion of the brain, the court held that: “All that is known is consistent with the natural view to take, namely, that the workman fell from the stair, there is thus a prima facie case for compensation.”⁷⁶

Where an employee, through an accidental injury, suffered a concussion of the brain, but recovered sufficiently to work for a week, when he fell dead, compensation was awarded on medical testimony to the effect that the death was caused by the injury.⁷⁷

A similar decision was rendered in a case where the employee died about eight months after suffering a concussion of the brain in an accidental fall, and had apparently recovered from its effects.⁷⁸

§ 167. **Death, Presumption From, While at Work.**—“It is said Hollenbach's death did not result from electric shock because the

73. *Bridgeman v. McLoughlin*, 7 N. Y. St. Dep. Rep. 425.

74. *In re Geo. L. Snider*, 3rd. A. R. U. S. C. C. 118.

75. *Van Winkle v. Johnson Co.*, 2 Cal. I. A. C. 212.

76. *Fagan v. Jack Bros.*, 31 Sheriff Ct. R. (Sc.) 332.

77. *Deem v. Kalamazoo Paper Co.*, 189 Mich. 655, 155 N. W. 584.

78. *Milwaukee Coke & Gas Co. v. Industrial Commission*, 160 Wis. 247, 151 N. W. 245.

voltage (114) was not sufficient to produce death. Defendent was a strong, able-bodied man in the full enjoyment of his faculties at the time the current struck him. The voltage may have been less than is usually found to produce death. The wire burned into his flesh. The current was so powerful that the other workmen could not take hold of his body long enough to remove him from the wire. He died under the current. In such cases the presumption is that the accident was the cause of death, and this presumption will prevail unless overcome by evidence."⁷⁹

Where the evidence showed that the deceased workman had for 21 years been in perfect physical condition, it is the reasonable presumption that his sudden death while at work was due to external efficient agency.⁸⁰

Where an elevator operator was found dead in the bottom of the shaft, and the elevator was found stopped between floors, the court held that, in view of the presumption against suicide and in favor of accident, the evidence was sufficient to sustain the award.⁸¹

Where a sailor, recovering from a drinking bout, disappeared from a deck having a railing about it 3½ feet high, the court held that in spite of the presumption against suicide, it was unable under the circumstances to infer that the death of the deceased was due to an accident.⁸²

Where an employee was killed when he entered a transformer room in violation of rules, the court held that the burden was on the administrator to prove that the accident arose out of and in the course of the employment.⁸³

The same rule was followed where a hotel porter, who was supposed to be off duty, was found dead in an elevator.⁸⁴

79. *Hollenbach Co. v. Hollenbach*, 181 Ky. 262, 204 S. W. 152, 2 W. C. L. J. 492, 16 N. C. C. A. 879.

80. *Bloomington etc., R. Co. v. Industrial Board*, 276 Ill. 454, 114 N. E. 939.

81. *Wishcaless v. Hammond Standish & Co.*, 201 Mich. 192, 166 N W. 933, 17 N. C. C. A. 793.

82. *Rourke v. Holt & Co.*, W. C. & Ins. Rep. 7, 51 Ir. L. T. 121.

83. *Northern Ill. L. & T. Co. v. Industrial Board*, 279, Ill. 565, 117 N. E. 95, 15 N. C. C. A. 159; *Grant v. Fleming Bros Co.*, —Ia.—, 176 N. W. 640, 5 W. C. L. J. 688.

84. *Savoy Hotel Co. v. Industrial Board*, 279 Ill. 329, 116 N. E. 712, 15 N. C. C. A. 233.

Where death results from injury, the dependents are entitled to recover although death may not have been the natural or probable consequence of the particular injury⁸⁵

"The board could reasonably infer from the facts proved by direct or circumstantial evidence that the employee fell from the frost covered and unguarded trestle to the ground thirty-six feet below, and thereby sustained fatal injuries. We cannot say that such a conclusion is based upon mere surmise or speculation; it is supported by logical reasoning from established facts."⁸⁶

Where a workman was found dead on a cement floor at the bottom of some stairs, a wooden beam having been placed about 4 feet above the stairs the same day, the court, in affirming an award of compensation, said: "Circumstances shown may justify inferences which bring liability within the realm of probability, rather than leaving it a matter of conjecture merely."⁸⁷

Where a night watchman was found dead at the bottom of a well under a stairway, it held that an award of compensation was justified by the evidence.⁸⁸

On August 15, 1916, the husband of the petitioner was a farm hand, whose particular employment on that day was to make a trip to Philadelphia with a truck wagon drawn by a team of mules. He left the farm between 5 and 6 o'clock in the afternoon, and at 2 o'clock the next morning was found dead, sitting on the seat of the truck with his body crushed between the seat and the overhanging roof of a shed, under which the mules were standing. From the circumstantial details in evidence, the judge of the pleas determined that the decedent's death was caused by an accident, and that such accident arose out of and in the course of his employment.⁸⁹

85. *Dunham v. Clare*, 66 L. T. 751, 4 W. C. C. 102.

86. *In re Uzzio*, 228 Mass. 331, 117 N. E. 349, 15 N. C. C. A. 235, 1 W. C. L. J. 80; *Davis v. Boston Elev. Ry.* 222 Mass. 475, 111 N. E. 174. Proof may be by circumstantial evidence. *Peoria Ry. Terminal Co. v. Indus.* Bd. 279 Ill. 352, 116 N. E. 651, 15 N. C. C. A. 632.

87. *DeMann v. Hydraulic Engineering Co.*, 192 Mich. 594, 159 N. W. 380, 15 N. C. C. A. 236.

88. *Fogarty v. National Biscuit Co.*, 221 N. Y. 20, 116 N. E. 346.

89. *Dixon v. Andrews*, 92 N. J. L. 512, 103 Atl. 410, 2 W. C. L. J. 105.

Where a workman was found dead beside his work on a low platform, from which he had fallen, the autopsy showing mitral regurgitation, the court, in denying compensation said: "It cannot be assumed that the man made a misstep and then again assumed that such misstep caused fright, and then again assumed that the fright caused the heart to stop. This would not only be basing an assumption upon an assumption, but would be taking one into the realms of conjecture."⁹⁰

Evidence that an employee, in previous good health, dropped dead at the moment of contact with an electric wire or socket while he was working on a wet cement floor, sustains a finding that he died an accidental, and not a natural death.⁹¹

Where a workman, who previously had been in good health, suffered a slight injury to the eye, which gradually became worse until he lost the sight of the eye, and then gradually grew worse, exhibited neurotic symptoms and died six months after the accident, it was held that there was evidence to support the finding that the accident was the proximate cause of the death.⁹²

If death ensues it is immaterial whether that was the reasonable and likely consequences of the injury or not; the only question is whether in fact death resulted from the injury.⁹³

The Workmen's Compensation Act does not required demonstration as to the cause of death, but only that degree of proof which produces conviction in an unprejudiced mind.⁹⁴

"The dependents were not required to present such proof as would entirely exclude the possibility that the decedent's death was due in part to a diseased condition of the heart."⁹⁵

90. *Guthrie v. Detroit Shipbuilding Co.*, 200 Mich. 385, 167 N. W. 37, 1 W. C. L. J. 1035.

91. *State v. District Court*, 134 Minn. 324, 159 N. W. 755.

92. *Johnston v. Southern Cal. Box Factory*, 1 Cal. Ind. Com. Part 2, 577.

93. *In re Sponatske*, 220 Mass. 526; 108 N. E. 466, 8 N. C. C. A. 1025.

94. *Shell Co. v. Industrial Acc. Comm.* 36 Cal. App. 463, 172 Pac. 611, 2 W. C. L. J. 34; *Western Grain etc. Products Co. v. Pillsbury*, 173 Cal. 135, 159 Pac. 423.

95. *Bucyrus v. Townsend* 64 Ind. App. —, 117 N. E. 565, 1 W. C. L. J. 166.

§ 168. **Delirius.**—Where an injured workman, while delirious as a result of injuries received, did things contrary to the doctor's orders, got out of bed and subsequently died, possibly from the effect of these acts, it was held that the rights of dependents to death benefits was not thereby affected.⁹⁶

§ 169. **Delirium Tremens.**—Where a condition of alcoholism or tremens is aggravated through an accidental injury causing death, the death is held to be due to the accident.⁹⁷

Where an employee suffered a serious physical injury, and while in the hospital developed delirium tremens, and the physicians testified that the injury was sufficient to be the producing cause of the delirium tremens in view of the employee's habits, compensation was awarded.⁹⁸

Where it appeared that delirium tremens would not have developed had it not been for the injury and the shock following it, the court said, "The fact that his system had been so weakened by his intemperate habit that it was unable to withstand the effects of the injury does not thereby shift the proximate cause of death from his injury to his intemperate habit."⁹⁹

§ 170. **Dementia Praecox.**—Where an employee sustained a fracture of the right tibia, and while still disabled was committed to a hospital for the insane, the commission found after extended testimony from alienists that dementia praecox is a type of insanity into which trauma cannot enter either as a direct cause

96. *Brogi v. Hammond Lumber Co.*, 1 Cal. Ind. Acc. Comm., (Part 11) 137.

97. *Sullivan v. Industrial Engineering Co.*, 173 App. Div. 65, 158 N. Y. S. 970; *Carroll v. Knickerbocker Ice Co.*, 169 App. Div. 450, 155 N. Y. S. 1; *Winters v. New York Herald Co.*, 171 App. Div. 960, 155 N. Y. S. 149; *Dunn v. West End Brewing Co.* 5 N. Y. St. Dep. Rep. 380. Affirmed later in the appellate Div; *In re James Kelley*, 3rd A. R. U. S. C. C. 122.

98. *Minnis v. Young* 9 N. Y. St. Dep. Rep. 314.

99. *Ramlow v. Moon Lake Ice Co.*, 192 Mich. 505, 158 N. W. 1027, L. R. A. 1916 F. 955, 14 N. C. C. A. 295.

or as a precipitant. It was held that the applicant was entitled to compensation solely for the disability incident to the fracture.¹

§ 171. **Dermatitis.**—Where a chambermaid contracted dermatitis, an infection of the hands, it was held that the resulting disability was not compensable, because there was no proof of its accidental origin or of an opportunity for the infection to enter by accident.²

Compensation was awarded in a case of “Dermatitis venenata.” The commission said, “we are inclined to the opinion that the infection in this case is to be attributed to walking back and forth all day in this wood dust to the depth of an inch, which irritated the lower limbs and was communicated to the hands and arms, perhaps from scratching the lower limbs.”³ This was therefore held to be a personal injury and consistent with the Act as amended by the elimination of the word “accident,” prior to the occurrence of disability in this case. Though the commissioners admitted the case was not free from difficulties.

A claim for disability resulting from dermatitis alleged to have been caused by the handling of heavily inked papers was denied because of lack of medical evidence to sustain the claim.⁴

A claim was allowed for disability resulting from dermatitis due to irritation caused by machine oils.⁵

§ 172. **Diabetes.**—All the evidence tended to prove that before the accidental injury the employee was a well man, a few days after the injury his urine was examined and there were indications of the presence of diabetes. The court in affirming an award held that the conclusion that the diabetic condition resulted from the injury was not based on mere conjecture, there be-

1. *Oliver v. Union Iron Works*, 5 Cal. I. A. C. D. 193; *Laderman v. Standard Accident Insurance Co.*, 2 Mass. I. A. Bd. 551.

2. *McDonald v. Dunn*, 2 Cal. I. A. C. Dec. 91; *Petschett v. Preiss*, 8 B. W. C. C. 44.

3. *Reeves v. The Diamond Match Co. et al.*, 5 Cal. I. A. C. D. 236.

4. *In re Theodore H. Schlessman*, 2nd. A. R. U. S. C. C. 154.

5. *In re S. G. Moran*, 3rd. A. R. U. S. C. C. 155.

ing evidence that a well and healthy man when injured might develop the disease.⁶

In a suit at common law for damages, the court held evidence of the existence of diabetes resulting from the accident admissible.⁷

§ 173. **Disease Following Injury.**—Disease must be traceable to an accident before it is compensable.⁸

Where an employee suffered a rupture, and after an operation left the hospital two weeks after the injury, which was on April 14th, in a thin and emaciated condition, and on September 22nd entered an infirmary, and died of pulmonary tuberculosis on December 12th, it was held that the claimant had not sustained the burden of showing that there was any connection between the rupture and the death.⁹

Under a policy covering death as a result of injuries caused solely by external, violent and accidental means, the insurer was held liable where death was caused by a disease which was itself caused by external, violent and accidental bodily injuries.¹⁰

Where an accident to an employee's eye, which at first appeared not serious, resulted, after a week or more in a diseased condition of the eye which destroyed the sight, the injury occurred, within the meaning of the statute, when the diseased condition culminated.¹¹

Decedent, working in a blacksmith shop, pinched his finger and an infection resulted. Four operations were performed, the last apparently successful. Four days later he was suffering from acute inflammatory rheumatism and died in ten days. The physician

6. *Balzer v. Saginaw Beef Co.*, 199 Mich. 374, 165 N. W. 785, 1 W. C. L. J. 399.

7. *Woody v. Louisville R. Co.*, 153 Ky. 1, 154 S. W. 384.

8. *Blair v. Omaha Ice and Cold Storage Co.*, — Neb. —, 165 N. W. 893, 1 W. C. L. J. 424; *In re Patrick Coughig*, 2nd A. R. U. S. C. C. 128.

9. *Kemp v. Clyde Shipping Co., Ltd.*, 119 L. T. R. 131, 17 N. C. C. A. 876.

10. *Armstrong v. West Coast Life Ins. Co.*, 41 Utah 112, 124 Pac. 518. *Squire Dingee Co. v. Indus. Bd.*, — Ill. —, 117 N. E. 1031, 1 W. C. L. J. 331.

11. *Johansen v. Union Stockyards Co.*, 99 Neb. 328, 156 N. W. 511.

who treated him during the ten days was of the opinion that the rheumatism was caused from a secondary infection as a result of the local one. The other physicians claimed the fourth operation entirely eradicated the infection. The court, in affirming the award, held that the board was the judge of the credibility of the witness both medical and lay, and its finding in the absence of fraud was conclusive, if there was any evidence to support it.¹²

Deceased, while employed in a bowling alley, suffered a broken thigh bone, from a flying pin. He was discharged from the hospital with the bone not entirely healed, and later reentered the hospital and died. Deceased had a cut on his forehead which an attendant stated he had suffered by falling when he tried to get up. Reversing the judgment, the court held that there was no evidence from which a fair inference could be drawn that deceased's death resulted from the injury sustained in the bowling alley.¹³

Deceased slipped and struck his head. He was dizzy for a few minutes, but continued to work. He complained of pains in his head, but worked all afternoon. He did not work the following day on account of the weather, but did work the next day. He went home weak and dizzy, and never recovered. A lump came out at the end of his spine. The physician who treated him said that he died of pneumonia, the others said he did not. Affirming the award the court said that it was unable "to say there was no testimony supporting the finding of fact of the board that the death was due to the injuries received while in the employ of the defendant."¹⁴

Deceased fell and struck his head, and was unconscious for a few minutes, and three days afterwards resumed his duties and worked for a week, and was apparently normal. About three weeks thereafter he entered a hospital, and in two weeks died.

12. *Perdew v. Nuffer Cedar Co.*, 201 Mich., 520, 167 N. W. 868, 17 N. C. C. A. 884, (1918).

13. *Perry v. Woodward Bowling Alley Co.*, 196 Mich. 742, 163 N. W. 52, 17 N. C. C. A. 885.

14. *Homan v. Boardman River Elec. Light & Power Co.*, 200 Mich. 206, 166 N. W. 860 (1918).

It was contended that the evidence was not sufficient to sustain the finding that death resulted from the injury. The doctor who made an autopsy testified that the death resulted from a hemorrhage of the brain of traumatic origin, which the court on appeal held sufficient to justify the finding.¹⁵

Latent disease, accelerated by an accident to the extent that it produces disability is compensable.¹⁶

"Where a workman receives a personal injury from an accident arising out of and in the course of his employment, and disease ensues which incapacitates him for work, the incapacity may be the result of the injury, within the meaning of the (English) Workmen's Compensation Act, even though it is not the natural result of the injury. The question to be determined on a claim for compensation is whether the incapacity is in fact the result of the injury. *Ystradowen Colliery Co. v. Griffiths*, (1909) 2 K. B. 533. In a case where a petitioner's arm was broken while he was in defendant's employ, and the fracture properly united, but there developed an abscess upon the fleshy part of the thumb, which resulted in ankylosis, making the thumb useless, the Supreme Court held that the ankylosis of the thumb was an injury arising by accident out of and in the course of the employment. *Newcomb v. Albertson*, 85 N. J. Law, 435, 98 Atl. 928. And Mr. Justice Swayze, in writing the opinion in *Liondale Bleach Works v. Riker*, 85 N. J. Law, 426, at Page 429, 89 Atl. 929, observed that the question of disease following an accident was considered in *Newcomb v. Albertson*, *Supra*. The decision there, rested on certain English cases, is to the effect that an injury which follows an accident, and which but for the accident would not have happened, justifies the finding that the injury in fact results from the accident."¹⁷

15. *State ex rel. London & L. Indemnity Co. v. District Court Hennepin Co.*, 139 Minn. 409, 166 N. W. 722, (1918).

16. *Indianapolis Abattoir Co. v. Coleman*, — Ind. App. —, 117 N. E. 502 1 W. C. L. J. 41.

17. *Lundy v. George Brown & Co.*, — N. J. App. — 108 Atl. 252, 5 W. C. L. J. 294; *State ex rel. Anseth v. District Ct. of Koochiching County*, 134 Minn. 16, 158 N. W. 713; *Foley v. Home Rubber Co.*, 89 N. J. Law, 474, 99 Atl. 624, Affirmed 91 N. J. Law, 323, 102 Atl. 1053.

Where an injury so reduced an employee's vitality as to leave him susceptible to an attack of disease which caused his death, the death can be said to be due to the original accident.¹⁸

Disease contracted in the course of the employment and resulting in pain does not amount to an accidental injury and is not compensable.¹⁹

Locomotor ataxia following an injury, being a form of syphilis, was held not to be due to the injury but rather to the syphilitic condition and not compensable under the Federal Act.²⁰

Death from a disease contracted while in a weakened condition, caused by bad air and not traceable to a definite time, place and cause, is not a compensable accidental injury.²¹

Where an attack of caisson disease came on suddenly, due to the negligence of a coemployee in decompressing air too fast, and resulted in the death of the employee, death was due to an accidental injury arising out of the employment and not to some inherent physical defect.²²

Disease contracted while caring for patients in a hospital is compensable under the Federal Act.²³

A claim for disability from chorea due to overwork was disallowed, the medical testimony being that this disease was not caused by overwork.²⁴

Where death results from disease and not from the injury compensation will be denied.²⁵

18. *Lanner v. Aluminum Castings Co.*, —Mich.— (1920), 178 N. W. 69, 6 W. C. L. J. 337.

19. *Pimental's Case*, —Mass.— (1920), 127 N. E. 424, 6 W. C. L. J. 185; *In re Henry Mayer*, 3rd. A. R. U. S. C. C. 163.

20. *In re Joseph Bradley*, 3rd. A. R. U. S. C. C. 127; *In re Elmer D. Light*, 3rd. A. R. U. S. C. C. 161.

21. *Prouse v. Indus. Comm.*, —Colo.—, 194 Pac. 625.

22. *Williams v. Missouri Bridge and Iron Co.*, —Mich.— (1920), 180 N. W. 357.

23. *In re Mary C. O'Hanlon*, 2nd A. R. U. S. C. C. 195.

24. *In re Russell A. Cummings*, 2nd A. R. U. S. C. C. 153.

25. *In re Chas. E. Garvin*, 2nd A. R. U. S. C. C. 178; *In re Wm. A. Kell*, 2nd. A. R. U. S. C. C. 179; *In re Wm. J. Lehr*, 2nd. A. R. U. S. C. C. 183.

§ 174. **Dislocation.**—A dislocation of the semilunar cartilage of the knee, caused by quickly arising from a stooping position, required by the nature of the employment, was held to be an accidental injury.²⁶

Where an employee slipped and fell, dislocating the clavicle, and was operated upon three days later, and died of hypostatic pneumonia, caused by the weakening of his system by the operation, it was held that his widow was entitled to compensation.²⁷

Where an employee, through accidental injury, suffered a dislocation of the cecum, general adhesions in the abdomen, and constipation, resulting in traumatic peritonitis, which condition necessitated the removal of the appendix, all this was held to be caused by the accident, and the resulting disability compensable.²⁸

Where an elevator operator, in raising heavy gates above his head, sustained a dislocation of the collar bone, it was held that the resulting disability was compensable.²⁹

§ 175. **Dizziness.**—There was testimony to the effect that nails protruded from the floor where applicant worked, and on two occasions prior to this, applicant testified, he had tripped on them, but he also stated that he could not account for the fall unless the nails caused it. Affirming an award of the board the court said: "While plaintiff testifies that at times he has been dizzy and weak, he also testifies that it was nothing to speak of, but slight, and never sufficient to cause him to lose his balance and fall. His fellow workmen and superiors in the plant who saw him daily never noticed any appearance of dizziness or fainting, and never saw him fall before. The fact that he did not recall just how the accident happened is in no way extraordinary, when we contemplate that in the fall he struck his head with sufficient force to inflict a gash in his scalp. He was over 70 years of age, not as nimble as in his younger years, and had had trouble with his limbs and feet a short time before. We are not persuaded that

26. *Giampolini-Lombardi Co. v. Raggio*, 2 Cal. I. A. C. 936.

27. *Cantwell v. Traveler's Insur. Co.*, 2 Mass. Wk. Comp. Cases 246.

28. *Gregg v. Frankfort Gen. Ins. Co.*, 2 Mass. W. C. C. 581

29. *Bonin v. California Hawaiian Sugar Refinery*, 3 Cal. I. A. C. 334.

we should say, as a matter of law, that the cause of the accident under the evidence in the case is so conjectural as to require us to set aside the finding and award of the board.³⁰

Where a workman was working on a pile of bricks, fifteen feet above the ground, and was seized "with an attack of vertigo, or with some similar disorder which caused him to fall to the ground," the court in affirming an award of compensation held that the fainting and fall were caused by the conditions under which the man was working.³¹

Where there was evidence to the effect that a hack driver's team ran into the curbing and pitched the driver out on the sidewalk, the court held that his fall was due to something more than mere dizziness or unconsciousness from which he suffered just before the accident.³²

Where a workman received an accidental injury, became dizzy and fell down stairs, it was held he was entitled to compensation during the continuance of disability from both injuries.³³

Where an employee, because of dizziness, fell and sustained a concussion of the brain, compensation was denied because there was no evidence to connect the cause of the fall to a risk incidental to or arising out of the work being performed.³⁴

§ 176. **Dog Bite.**—"The presence of the dog, with defendant's implied knowledge and consent, was one of the physical conditions of the plant under which the defendant required the plaintiff to perform his duties. The mere fact that the direct cause of the injury was animate rather than inanimate does not alter the result." It was held to be a compensable accident.³⁵

30. *Wilson v. Phoenix Furniture Co.*, 210 Mich. 531, 167 N. W. 839, 17 N. C. C. A. 786.

31. *Santacrose v. Sag Harbor Brick Works*, 182 N. Y. App. Div. 442, 169 N. Y. Supp. 695, 17 N. C. C. A. 787.

32. *Carroll v. What Cheer Stables Co.*, 38 R. I. 421, 96 Atl. 208, 12 N. C. C. A. 174.

33. *Murray v. Massachusetts Employe's Ins. Assn.* 1 Mass. I. A. Bd. 436.

34. *Van Winkle v. Johnson Co.*, 2 Cal. I. A. C. D. 189.

35. *Barone v. Brambach Piano Co.*, 101 Misc. Rep. 669, 167 N. Y. S.

§ 177. **Drinking Acid or Poison by Mistake.**—Where an employee was killed as a result of drinking acid by mistake, from a bottle which he found where he was accustomed to keep a bottle of drinking water of like appearance, it was held to be a compensable accident.³⁶

Where an employee drank beer furnished by the employer, but poisoned by an employee, the resulting disability was held not compensable.³⁷

§ 178. **Drowning.**—Where a traveling salesman found it necessary, in order to reach his destination, to cross a river in a row boat, and was drowned in crossing, it was held to be a compensable accident.³⁸

An employee in charge of a boat permitted it to slip away from the dock, and in attempting to get into it from the dock, fell into the water and was drowned, after starting to swim upon his back to the stern of the boat. This was held to be a compensable accident.³⁹

Where it was claimed that the employee jumped into the water with the intent to commit suicide, it was held that the evidence was sufficient to sustain an award for accidental death by drowning.⁴⁰

Where an employee was drowned in attempting to clean rocks which protected an intake flume, it was held to be an accident within the meaning of the compensation act.⁴¹

933, 1 W. C. L. J. 703; In re Wm. Miller, Vol. 1, No. 7, Bul. Ohio I. C., p. 46; In re Bailey, Op. Sol. Dept. of L. 232.

36. In re Osterbrink, 229 Mass. 407, 118 N. E. 657, 1 W. C. L. J. 814; Archibald v. Ott, 77 W. Va. 448.

37. Koch v. Oakland Brewing & Malting Co., 1 Cal. I. A. C. D. 373.

38. McCarthy Bros. Co. v. District Court Hennepin, Co., 141 Minn. 61, 169 N. W. 274, 17 N. C. C. A. 959.

39. Boyle v. Mahoney & Tierney, 92 Conn. 404, 103 Atl. 127.

40. Western Fuel Co. v. Industrial Commission, 159 Wis. 635, 150 N. W. 998.

41. Boody v. K. & C. Mfg. Co., 77 N. H. 208, 90 Atl. 859, L. R. A. 1916 A. 10, 5 N. C. C. A. 840; Leach v. Oakley, 1 K. B. 523, 4 B. W. C. C. 91.

Where the evidence showed that a sailor went on deck at night to get fresh air, and was found next morning in the water, dead, this was held sufficient proof of accident.⁴²

§ 179. **Dust.**—Where an employee was sawing timbers, it was held that it might be inferred, when he said that he got dust in his eye, that he meant saw dust from the sawing he was doing, and it was therefore a compensable accident.⁴³

It has been held that disability caused by the inhalation of fine dust into the lungs in the course of employment, is an injury under the Federal Act.⁴⁴

Where the blowing of cement dust into the eyes of a workman continued the disability from the disease of trachoma, it was held a compensable accident.⁴⁵

Where a stone grinder was injured by inhaling small particles of stone and dust, by reason of which he contracted fibroid tuberculosis, it was held that he was entitled to compensation under the Massachusetts Act.⁴⁶

Where it was determined that the loss of sight of the eye was due to natural causes, rather than irritation from emery dust accidentally getting into the eye, compensation was denied.⁴⁷

Compensation was allowed for disability due to iron rust accidentally entering a workman's eye.⁴⁸

§ 180. **Dysentery.**—Dysentery caused by drinking impure water furnished by the employer for drinking purposes is compensable injury under the Federal Act.⁴⁹

42. *Marshall v. Owners of Ship, "Wild Rose,"* 3 B. W. C. C. 514 H. L.

43. *Dickinson v. Industrial Board of Ill.,* 280 Ill. 342 117 N. E. 438, 17 N. C. C. A. 154.

44. *In re Edward Edmonds, Op. Sol. D. L. (1915),* 254; *In re Carey E. Stone,* 3rd. A. R. U. S. C. C. 114.

45. *Beauchamp v. Chansler-Confield Midway Oil Co.,* 2 Cal. I. A. C. Dec. 485.

46. *Kalanquin v. Traveler's Insur. Co.,* 2 Mass. Wk. C. C. 748.

47. *Lohrke v. Benicia Iron Works,* 1 Cal. I. A. C. D. 261.

48. *Keatly v. Shields & Son,* 1 Cal. I. A. C. D. 191.

49. *In re Fred J. Shurz,* 2nd A. R. U. S. C. C. 100.

§ 181. **Eczema.**—Where eczema was caused by dipping rings into a basin of carbon bisulphide, it was held not to be an accidental injury.⁵⁰

Where an employee after ten days service in a bleachery, developed eczema, it was held not to be an accidental injury.⁵¹

Where an employee in bad physical condition sprained his ankle, which was followed by eczema and various other troubles, it was held that the employer takes the employee as he finds him, and all disability will be considered due to the accident.⁵²

§ 182. **Embolism.**—In the opinion of the attending physician a thrombus or an embolism may have caused the death of a laborer, who died suddenly in bed, five or six months after an accident that had seriously injured his head and body. The Appellate Division affirmed an award to his family, unanimously and without opinion.⁵³

An employee fell from a ladder, sustaining a fracture of the pelvic bone, was taken to a hospital, was making satisfactory progress, but died suddenly at the end of two weeks. The court, in affirming an award of the Commission, said: "The theory that an embolus arising from the injury had caused the death was 'guess work' only in the sense that there was no direct evidence of the existence of such embolus. But in Dr. Ophuls' view, other conceivable causes were shown, and the one which he advanced remained as the most probable one. This was a sufficient basis for the action of the Commission."⁵⁴

Where there was conflict in the testimony as to whether the

50. *Evans v. Dodd*, 5 B. W. C. C. 305.

51. *Liondale Bleach, Dye & Paint Wks. v. Riker*, 85 N. J. L. 426, 89 Atl. 929.

52. *Rouda & Spivock v. Heenan*, 3 Cal. I. A. C. D. 36.

53. *Judice v. Degnon Contracting Co.*, 181 App. Div. 909, 167 N. Y. S. 1107; *Casey v. Borden's Condensed Milk Co.*, 182 App. Div. 907, 168 N. Y. S. 1104; *In re Benjamin H. Flucht*, 2nd A. R. U. S. C. C. 103.

54. *Santa v. Industrial Acc. Comm.*, 175 Cal. 235, 165 Pac. 689, 15 N. C. C. A. 636.

disability was due to pre-existing ailments or to embolism, the Commission's finding on the latter theory is conclusive.⁵⁵

Where one employee imagined he saw another employee about to be killed, and immediately sustained a stroke of paralysis, which resulted in death, the medical testimony being to the effect that the paralysis might have been caused by severe mental shock, or by cerebral embolism due to a former diseased condition of the heart, it was held that the evidence was insufficient to prove accidental death arising out of the employment.⁵⁶

Where an employee suffered a hernia by accident the Commission said: "Passing now from the question of hernia to the immediate cause of the man's death, is there any connection between the ordinarily simple and safe operation for the radical cure of hernia and the pulmonary embolism which I find was the direct cause of the death of Mr. Maloney. Dr. Coley in the article already cited in Keen's Surgery (1914 Ed., Vol. 4, page 38), mentions the fact that following this operation a certain number of deaths have been reported as due to embolism. Dr. Frazier in Vol. 1, Keen's Surgery, page 446, says that pulmonary embolism, while comparatively rare, occurs with some frequency as the sequel of abdominal operations." It was so found, and compensation awarded.⁵⁷

Where an employee's death was caused by an embolus, resulting from a septic condition following an amputation of a leg crushed by an accident, it was held that the death was due to the accident.⁵⁸

§ 183. **Epilepsy.**—Where a laborer was working on a scaffold 5 feet wide, 39 feet from the ground, guarded by a rope 3 feet high around its edge, suffered an epileptic fit and rolled off of the scaffold, the court said: "There was nothing in the nature of the

55. *Fowler v. Risedorph Bottling Co.*, 175 N. Y. App. Div. 224, 161 N. Y. Supp. 535; *In re Frederick E. Walker*, 2nd. A. R. U. S. C. C. 155.

56. *Keck v. Morehouse*, 2 Cal. I. A. C. D. 264.

57. *Maloney v. Waterbury Farrel Foundry & Machine Co.*, 1 Conn. C. D. 220.

58. *Akins v. Pacific Light & Power Corporation*, 2 Cal. I. A. C. D. 911.

work which the deceased was doing at the time that had any tendency to bring on a fit of epilepsy. Neither the fit, nor the fall, nor the injury, was produced by the nature of the work in which he was engaged. The injury was doubtless the greater by reason of the distance from the scaffold to the ground, but this distance was not due to the nature of the work itself. The question whether or not such an injury arises 'out of' the employment cannot and does not depend upon the height from which the employee falls or the extent of the injury he receives as the result of the fit."⁵⁹

"There is no claim that the scaffold was improperly constructed or in any way unsuitable for the service. Due to no conditions arising out of his employment, but solely to his predisposition to epilepsy, of which his employer had no notice, he fell from the scaffold, receiving an injury from which death resulted. The fall was caused and caused only by the epileptic fit. The fit was the direct and only cause of his injury. We do not think it would be seriously contended that had he fallen in an epileptic fit while standing on the floor, and received the injury he did that the injury arose out of the employment, and that the defendant was liable. The distance of the fall might contribute to the extent of the injury, but it was not a contributory cause to the fall. When the deceased was seized with the epileptic fit he would have fallen, no matter where he was, and the employer cannot be held responsible because that unfortunate seizure occurred when the workman was on a scaffold, a few feet from the floor."⁶⁰

Where an employee suffered an accidental blow on the head, and subsequently developed epilepsy, it was held that the evidence was insufficient to prove that the blow on the head was so severe that the epilepsy could be said to be of traumatic origin.⁶¹

59. *Brooker v. Industrial Acc. Commission*, 176 Cal. 275, 168 Pac. 126 (1917), 1 W. C. L. J. 9.

60. *VanGorder v. Packard Motor Car Co.*, 195 Mich. 588, 162 N. W. 107 (1917), 15 N. C. C. A. 214.

61. *Larson v. Powers*, 2 Cal. L. A. C. D. 320.

Where epilepsy followed after the employee had suffered a fracture of his skull, the resulting disability was held compensable.⁶²

“In view of the evidence in this case, the Board is not called upon to speculate as to whether an epileptic fit was or not the moving cause of decedent's fall into the water. With this view of the case, it is unnecessary to pass upon the issue which would have been presented if in fact an epileptic fit had been the moving cause of the drowning. Awards have, however, been upheld in Great Britain and in other jurisdictions where an epileptic fit was the moving cause and a hazard of the employment intervened. In *Wicks v. Dowell & Co., Ltd.* (1905 7, W. C. C. A.), where a man working on the edge of an open hold of a ship had an epileptic fit and fell into the hold, the court held ‘that the accident arose out of the employment.’ This case has been followed by the Massachusetts Commission in *Driscoll v. Cushman Express Co.* An opposite view has been taken in some states. *Van Gorder v. Packard Motor Car Co.*, 162 N. W. 107; *Brooker v. Indus. Acc. Com.*, 168 Pac. 126.”⁶³

Where an employer, while at work, was seized by an epileptic fit and suffered a dislocation of his shoulder, his claim for compensation was denied.⁶⁴ Under the Federal Act compensation is allowed in such cases.⁶⁵

It has been held by the Wisconsin Commission that injuries sustained by fall due to epileptic fit are not compensable unless there is some peculiar hazard connected with the place of the fall.⁶⁶

§ 184. **Erysipelas.**—Where an employee froze his nose in the course of his employment, causing a break in the skin, and erysip-

62. *Butt v. Gellyceidrin Colliery Co.*, 3 B. W. C. C. 344.

63. *Barnett v. Silver*, 2nd Ky. R. W. C. L. D. p. 121.

64. *Allard v. Ingersol & Bro.*, 1 Conn. C. D. Part 1, p. 274.

65. *In re Wm. Trenkel*, 2nd A. R. U. S. C. C. 249; *In re James J. Gorman*, 2nd. A. R. U. S. C. C. 249.

66. *Kowalski v. Trostel & Sons*, Fourth Annual Report Wis. Indus. Com. p. 17.

elas developed by means of a germ entering the break, the erysipelas was held to be due to an accident arising out of the employment.⁶⁷

Where death results from erysipelas, which follows as a natural though not as a necessary consequence of an accidental wound, it may be deemed the proximate result of the wound and not of the disease within the requirements of an accident policy that death must result solely from accidental means.⁶⁸

Decedent had been working in a loft of a boarding stable and came out to go down stairs. He stopped on the way at his apartment in the stable for a plate of soup. As he was going down stairs he slipped and fell, striking his head against a pillar. The wound became infected. Thereafter erysipelas developed, which, with other complications, caused his death. Compensation was awarded for the death.⁶⁹

Where erysipelas followed after an injury to a workman's foot the resulting disability was held compensable.⁷⁰

An ice wagon driver suffered a strain of his neck and shoulder. He applied liniment daily, from which an abrasion of the skin resulted, his pain increased until he died about two weeks thereafter in a hospital. The medical testimony was practically all to the effect "that erysipelas could have resulted from an abrasion of the skin caused by the use of liniment, which is a customary home remedy in case of strains." Compensation was awarded for the death.⁷¹

Where a workman's death occurred on September 27th from erysipelas, which first developed on the 15th, it was held to be the

67. *Larke v. John Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320, 12 N. C. C. A. 308.

68. *Caldwell v. Iowa State Traveling Men's Association*, 156 Ia. 327, 136 N. W. 678.

69. *Leslie v. O'Connor & Richman*, 5 N. Y. St. Rep. 383, 11 N. C. C. A. 501; *Aff'd*, 173 N. Y. App. Div. 988, 220 N. Y. 672, 116 N. E. 1057.

70. *Mutter v. Thomson*, 50 Scot. L. R. 447, 6 B. W. C. C. 424; *In re Jake Levinson*, 2nd A. R. U. S. C. C. 105.

71. *Dependent of Frank King v. City Ice & Coal Co.*, 2 Conn. C. D. Part 1, p. 168.

proximate result of an injury which he had received twenty five days prior to his death.⁷²

Where the employee suffered an accidental injury to his leg, apparently trivial in itself, and infection followed, so that erysipelas developed six days after, there was no new intervening cause of the disability, "the chain of causation has no missing link, and the injury was the proximate cause of the continuing disability."⁷³

A workman employed as a molder received some slight burns upon his arm; ten days later erysipelas developed at the site of the injuries and caused death. Compensation was allowed.⁷⁴

Where the medical testimony was to the effect that erysipelas was not caused by an injury, compensation was denied.⁷⁵

§ 185. **Eyesight.**—Where an employee engaged as a show card writer, while using wood alcohol to clean apparatus, had his vision impaired by reason of the fact that his eyes and optic nerve were exposed to and in contact with the vapor of wood alcohol in unusual quantities, it was held to constitute an injury sustained by accident, within the meaning of the California Act, as it read in January, 1914, in that it was unexpected, and unintentional.⁷⁶

§ 186. **Eye Injuries.**—"The opinions of the doctors cannot be reconciled. The testimony of the respondent is that he was a carpenter by trade, that up to the time of the accident he used either eye as convenience dictated, and that there had been no trouble with or diminution of his vision. A neighbor testified that about a year before the accident he was with respondent when he was shooting hogs and that he could shoot from one shoulder as well as the other, and that he never complained about his eyesight. One of the first inquiries made by oculists in cases of

72. *Dunham v. Clare*, 4 W. C. C. 102; *Stadlinski v. Smith Co. Inc.*, 1 Conn. C. C. 370.

73. *Nash v. The General Petroleum Co.*, 1 Cal. I. A. C. D. 103.

74. *In re Hipsher*, Vol. 4, Ohio I. C. 129.

75. *In re Patrick J. Farrell*, 2nd A. R. U. S. C. C. 105.

76. *Fidelity & Casualty Co. of N. Y. v. Industrial Acc. Com.*, 22 Cal. App. Dec. 816, 5 Cal. I. A. C. 38.

atrophy of the optic nerve is whether the patient has ever been afflicted with lues or any germ-carrying disease. There is no evidence that respondent was ever so afflicted. He denies that he was ever the victim of any such condition. These physical facts, coupled with the opinion of reputable oculists that the condition may have resulted from the accident is enough to sustain the judgment of the court below."⁷⁷

Loss of eyesight by a show card writer, caused by the use of wood alcohol, was held to be an accident within the California Workmen's Compensation Act, where it was shown that in his work he used dyes dissolved in wood alcohol and forced by air pressure through a needle, but ordinarily used this appliance very little but that just prior to the injury, which came on suddenly, he used an extraordinary quantity in cleaning the apparatus and his hands.⁷⁸

When an accident to the eye, which does not appear serious at first, but which results after a week or more, in a diseased condition which destroys the sight of the eye, the "injury occurred," within the meaning of the statute, when the diseased condition culminated.⁷⁹

A partial and temporary loss of sight, caused by the bursting of small blood vessels in the eye, due to increased blood pressure resulting from heavy lifting, was held compensable.⁸⁰

It was held to be an accidental injury where a workman while unloading bran containing grit, got some in his eye, and, rubbing it, caused an abrasion, necessitating the removal of the eye.⁸¹

Compensation was refused for loss of an eye due to a gonorrheal infection, where claimant was a plumber and while repairing a water basin "something" fell into his eye, which caused acute pain and impelled him to rub the eye in an effort to get it out. Two or three days later the infection developed. It appeared that

77. *Nelson v. Industrial Insurance Department*, 104 Wash. 204, 176 Pac. 15, 17 N. C. C. A. 1057.

78. *Fidelity & Casualty Co. of N. Y. et. al. v. Industrial Accident Commission of California* 177 Cal. 472, 171 Pac. 429, 17 N. C. C. A. 785.

79. *Johansen v. Union Stockyards Co.* 99 Neb. 328, 126 N. W. 511.

80. *Gurney v. Los. Angeles Soap Co.*, 1 Cal. I. A. C. Dec. 163.

81. *Adams v. Thompson* (1912), 5 B. W. C. C., 19 C. A.

prior to the accident he was free from gonorrheal infection. In refusing an award, the court said: "If this be correct, then any man at work at any occupation who gets something in his eye while at work and rubs the eye, the rubbing being followed by gonorrheal infection may recover for the loss of the eye simply on producing evidence of these facts, together with evidence tending to show that he did not have gonorrheal infection previously. We cannot agree that this is good law. It bases liability upon conjecture. Unless there be some evidence tending to show that the substance which fell in the eye caused the infection, and unless that fact be found, we cannot regard the subsequent loss of the eye as proximately resulting from an injury 'incidental to or growing out of employment.'" ⁸²

Claimant's eye had been injured by a splinter of steel striking it, and after two fellow employees had attempted to remove the steel, one, by pushing or rolling the eyelid back with a match wrapped in a piece of cloth, a gonorrheal infection set in and caused a partial loss of sight. Compensation was awarded, the court saying: "If the germ was introduced in an attempt to remove the flake of steel from the eye, it was a direct consequence of the accident, and arose out of and in the course of the employment. The attempt to remove the particle of steel was a natural and necessary result of its entry into the eye." ⁸³

A particle of ore struck a miner in the eye and in attempting to remove it a fellow workman used a match and handkerchief, after which the eye was washed in a trough used in common by other miners. A gonorrheal infection later set in, destroying the eye. The court held the loss of the eye to be an accident. ⁸⁴

Where fellow workmen attempted to remove from the eye of plaintiff, a spark which had entered it from a passing locomotive,

82. *Voelz v. Industrial Commission*, 161 Wis. 240, 152 N. W. 830, (1915), 15 N. C. C. A. 590. See also *McCoy v. Michigan Screw Co.* 180 Mich. 454, 147 N. W. 572, L. R. A. 1916 A. 323, 5 N. C. C. A. 455. In re *James S. Connolly*, 2nd A. R. U. S. C. C. 115; In re *Thomas H. A. Beckett*, 2nd. A. R. U. S. C. C. 114.

83. *Cline v. Studebaker Corp.*, 189 Mich. 514, L. R. A. 1916 C. 1139, 155 N. W. 519, (1915), 15 N. C. C. A. 588.

84. *State ex rel. Adriatic Min. Co. v. District Court St. Louis Co.*, 137 Minn. 435, 163 N. W. 755, 15 N. C. C. A. 588.

and two days later an infection developed, due to gonorrheal germs causing loss of sight, he was awarded compensation for the injury sustained.⁸⁵

A hard substance entered the eye of a workman while working in a foundry, and after being removed the next day by a specialist, an infection developed and he practically lost the vision thereof. The award was affirmed, it being held the injury was the proximate cause of the loss of vision.⁸⁶

Where an employee, in his application for compensation, stated that while he was sawing timbers, dirt or saw dust entered his left eye, and in his testimony stated that while so engaged, during a strong wind, that dust flew in his left eye, it might fairly be inferred that saw dust from his sawing flew into his eye. An award in his favor was affirmed.⁸⁷

A chip from a chisel caused a slight injury to the workman's eye. Thereafter, after the employee and at least four other persons had touched his eye, a gonorrheal infection destroyed the eye. Compensation was denied on the ground that the loss of the eye was due to a new cause independent of the accident.⁸⁸

Compensation was awarded for the loss of sight of an eye due to a strained neck, caused by an attempt to steady a barrel that had slipped from the hands of a driver while in the act of loading it upon a wagon.⁸⁹

Under the Federal Act conjunctivitis, caused by working in a very strong light, was held to be a compensable injury.⁹⁰

85. *Canadian Pac. R. Co. v. Flore*, 24 Dom. L. Rep. 710 (1915), 15 N. C. C. A. 589.

86. *New Castle Foundry Co. v. Lysker, Ind.* App. 120 N. E. 713, 17 N. C. C. A. 791.

87. *Dickinson v. Industrial Board of Illinois*, 280 Ill. 342, 117 N. E. 438, (1917), 1 W. C. L. J. 27, 16 N. C. C. A. 888.

88. *Doolan v. Henry Hope & Sons, Ltd.* 1918 W. C. & Ins. Rep. 121; 119 L. T. R. 14, (1918), 17 N. C. C. A. 879; *In re James Quinn* 2nd. A. R. U. S. C. C. 123.

89. *Duffy v. Town of Brookline*, 226 Mass. 131, 115 N. E. 248, 14 N. C. C. A. 537.

90. *In re H. E. Cuttright*, 3rd A. R. U. S. C. C. 119; But see to the contrary, *In re James Hawthorne*, 3rd A. R. U. S. C. C. 120.

A claim for impaired vision alleged to have resulted from an injury, was denied, where the medical testimony was to the effect that the loss of vision was caused by glaucoma and cataract, and not by the injury.⁹¹

Pink eye caused by dust from an electric fan being blown into her eye and contracted from association with a fellow employee is a compensable injury under the Federal act.⁹²

Where a workman's hood was accidentally broken while at work and his eyes exposed to the dazzling light caused from welding, which resulted in the loss of use of both eyes, his injury was compensable.⁹³

§ 187. **Facial Paralysis.**—A candy factory employee, working in a cool room gradually developed facial paralysis. This was held to be a compensable injury under the Massachusetts Act, but could not of course be so considered under those acts where the injury must be the result of an accident.⁹⁴

In a suit for damages, at common law, it was held proper for the jury to decide whether facial paralysis resulted from the employer's failure to properly heat the car in which the employee was required to work.⁹⁵

§ 188. **Falls from Vertigo or Other Like Causes.**—Where an employee was obliged to work upon a pile of brick, fifteen feet, above the ground, and was seized with an attack of vertigo, causing him to fall, sustaining injury, the court held, in a New York case, that the fainting and fall were caused by the elevated position in which the employee was working, and sustained a finding that the injury was accidental.⁹⁶

91. In re Wm. S. Hoover, 2nd A. R. U. S. C. C. 97; In re Clarence Mc-Donough, 2nd A. R. U. S. C. C. 124.

92. In re Mary J. Hedges, 3rd A. R. U. S. C. C. 132.

93. Rockford City Traction Co. v. Indus. Comm.—Ill.—, (1920), 129 N. E. 135, 7 W. C. L. J. 283.

94. Dalton v. Employers Liab. Assur. Corp. Ltd., 2 Mass. Workm. Comp. Cas. 231.

95. St. Louis and S. F. R. Co. v. McClain (Okla.), 162 Pac. 751 (1917).

96. Santa Croce v. Sag Harbor Brick Works, 182 N. Y. App. Div. 442.

A fall from a scaffold, caused solely by an epileptic fit, dizziness or fainting spell, cannot be said to result from an accident arising out of the nature or conditions of the employment, when the scaffold was only a few feet from the floor.⁹⁷

The same ruling was made in a case where the scaffold, guarded by a rope, was 39 feet above the ground, but the evidence showed that the injured employee was subject to epileptic fits.⁹⁸

An engine driver, after tightening a nut in his engine, fell to the ground, sustaining injuries from which he died. It appeared that he had been subject to fainting spells previous to this accident but had been pronounced physically fit for his position a few days before the accident, by the company physician. It was held to be an accident arising out of his employment, and compensable.⁹⁹

A man working on the edge of an open hold of a ship was seized with an epileptic fit, causing him to fall into the hold. This was held to be an accident arising out of the employment.¹

A driver of an express wagon fell from his wagon while driving, due to an epileptic fit, and fractured his skull, from the effects of which he died. The Industrial Accident Board held that the employee was exposed to a substantial and increased risk owing to his occupation, that the injury arose out of and in the course of his employment, and was compensable.²

169 N. Y. Supp. 695, 1 W. C. L. J. 1132, (1918), 17 N. C. C. A. 787; *Miller v. Biel* — Ind. —, 1920, 127 N. E. 567, 6 W. C. L. J. 315; *Board of Comm. of Greene Co. v. Shertzer* — Ind. App. — (1920), 127 N. E. 843, 6 W. C. L. J. 310.

97. *Van Gorder v. Packard Motor Car Co.*, 195 Mich. 588, (1917), 15 N. C. C. A. 214, 162 N. W. 107; *In re W. L. Soders* 3rd A. R. U. S. C. C. 129; *In re Geo. L. Farmer*, 2nd A. R. U. S. C. C. 94.

98. *Brooker v. Industrial Acc. Commission* 176 Cal. 275, (1917), 15 N. C. C. A. 215, 168 Pac. 126.

99. *Fennah v. Midland & Great Western Ry. of Ireland* (1911) 45 Irish L. T. 192, 4 B. W. C. C. 440; *Miller v. Biel*, — Ind. App. —, 1921, 129 N. E. 493.

1. *Wicks v. Dowell & Co. Ltd.*, 7 W. C. C. 14 C. A.

2. *Driscoll v. Cushman's Express Co.*, (Mass.), W. C. C. 1912-13-125, 130.

Where there is no peculiar hazard connected with the place of the fall, injuries sustained from a fall due to an epileptic fit are not compensable.³

Claimant was attacked with vertigo and fell, forward on a machine, upon which he was employed, sustaining injuries, which developed into inflammatory rheumatism. Physicians claimed that this disease might have been latent, and made active by the fall. The court held this to be an injury "in the course of the employment," stating that disability resulting from disease directly due to a physical injury or lighted up thereby, is an injury within the meaning of the act.⁴

A watchman who fell into a fire, while rendered unconscious by an attack of epilepsy, and who was badly burned, was held to have sustained an injury, within the meaning of the act.⁵

Where a janitor, overcome by heat while carrying a message, fell backwards, striking his head on a pavement and died from the effects of the injury, it was held that this was not an injury arising out of the employment.⁶

A carman sustained injuries in a fall from his van. Three weeks later the man died. No evidence being offered to show any connection between the fall and the cause of the death, the court held that it could not be said that death was caused by the accident.⁷

Where a workman fell from a cart, was injured, and died nine days later, the medical evidence being to the effect that no connection existed between the fall and the cause of the death, the court held that the defendant did not prove that the death was due to the accident, and denied compensation.⁸

A workhouse master, suffering from tuberculosis, had a fit of coughing while seated upon steps leading to his private room.

3. *Kowalski v. Trostel & Sons*, Fourth Annual Rep. Wis. Indus. Com. p. 17; *In re Stanley Lonowskix* 3rd A. R. U. S. C. C. 122.

4. *Re Washington Ellmore*, Op. Sol. Dep. C. & L. P. 207.

5. *Re E. B. Clements*, Op. Sol. Dep. C. & L. pg. 190.

6. *Rodger v. Paisley School Board* 49 Sc. L. R. 413, 5 B. W. C. C. 547.

7. *Honor v. Painter* (1911), 4 B. W. C. C. 188.

8. *Brown v. Kidman* (1911), 4 B. W. C. C. 199.

Giddiness resulted from the coughing and caused him to fall down the steps, breaking a rib, which caused pneumonia, resulting in death. This was held not to be an accident arising out of the employment.⁹

A buyer and department store manager, during a business trip, fell upon the bath room floor of a hotel and suffered injury to his face. The fall was caused by an attack of faintness. It was held the accident did not arise out of the employment.¹⁰

Where a workman suffered a dislocation of his shoulder and other injuries as a result of a fall caused by an epileptic fit. Compensation was denied.¹¹

Where the driver of a coal wagon fell dead, and no fracture of the skull or other evidence indicated that death resulted from the fall, but that it was due to natural causes, it was held that this was not an injury for which compensation could be allowed.¹²

Where a hack driver was pitched from his seat by the motion of the hack while driving and while helpless from dizziness or unconsciousness occasioned by a disease from which he was suffering, he was entitled to compensation for the resulting injuries, since his fall was an "accident arising out of his employment."¹³

Where an employee fell as the result of dizziness and disease and disability continued, but was not due to the fall, compensation was denied.¹⁴

Falls caused by dizziness, epilepsy, weakness and etc., while the employee is engaged in his regular duties, and resulting in injuries, justify an award under the Federal Act.¹⁵

9. *Butler v. Burton on Trent Union* (1912), 5 B. W. C. C. 355.

10. *Jacobs v. Davis-Schonwasser Co.*, 2 Cal. Ind. Acc. Com. (Part II), 50.

11. *Trostel & Sons' Fourth Annual Report* (1915) Wis. Ind. Com. 17.

12. *Lewis v. Globe Indemnity Co.*, 1 Mass. Ind. Acc. Bd. 48.

13. *Caroll v. What Cheer Stables Co.*, — R. I. — 96 Atl. 208.

14. *Swart v. Panama Cal. Espos. Co. and Md. Casulty Co.*, 1 Cal. Ind. Acc. Com. (Part 2), 50.

See *Cerbral Hemorrhage*, note 1.

15. *In re James J. Gorman* 2nd A. R. U. S. C. C. 249; *In re Geo. Uzuack*, 2nd A. R. U. S. C. C. 250; *In re Lydia K. Armentraut* 2nd. A. R. U. S. C. C. 250.

§ 189. **Felon.**—A frog felon, resulting from a bruise caused by pressing the hand against a screw driver, was not caused by an accident. "An accidental event takes place without one's foresight or expectation; an event that proceeds from an unknown cause, or is an unusual effect of the known cause, and therefore not expected."¹⁶

§ 190. **Flat Foot from Traumatism.**—Flat foot, resulting from accidental traumatism was held to be compensable.¹⁷

§ 191. **Floating Kidney.**—An employee, suffering for a considerable time with a floating kidney, is not entitled to compensation in the absence of evidence to show that the injury resulted from an accident in the course of his employment.¹⁸

§ 192 **Frostbite and Freezing.**—An employee, engaged in chopping wood and building a road, froze his thumb, necessitating its amputation. In the Minnesota Act it is provided that the word "accident," as used in the act, unless a different meaning is indicated by the context, shall be construed to mean "an unexpected or unforeseen event, happening suddenly and violently with or without human fault." On certiorari to review an award of compensation in favor of the employee the court, after remarking that freezing was a personal injury within the meaning of the act without question, and likewise that it was obvious that it was an "unexpected and unforeseen event," said: "The difficult question is whether the requirement that the event be one 'happening suddenly and violently' excludes it. Freezing comes suddenly and violently as distinguished from gradually and naturally or in ordinary course. In common talk a sudden or violent death is one occurring unexpectedly and not naturally or in the ordinary course of events. In some such sense the words are used

16. *Woodruff v. R. H. Howes Const. Co.*, — N. Y. App. Div. —, (1920), 127 N. E. 270, 6 W. C. L. J. 72.

17. *Frech v. San Joaquin and Power Corp.*, 2 Cal. Ind. Acc. Com. 641.

18. *Oberts v. Wisconsin Telephone Co.*, Fourth Annual Report (1915) Wis. Ind. Com. 24.

in the statute. Their effect is not to exclude from accidental injuries all except such as result from physical force applied from without. It is suggested in argument that these particular words with others employed in the same connection were used in caution to exclude occupational and other diseases. Whether such is their effect is not for decision here. We think that a fair construction of the statutory definition does not exclude freezing and we hold that it is a personal injury caused by accident within the meaning of the act."¹⁹

It was held that where the evidence warranted a finding that the employee was exposed to materially greater danger of getting his hands frozen than the ordinary outdoor worker, that therefore the injury arose out of the employment and was not merely a consequence of working out of doors in severe weather.²⁰

A woodsman misunderstood his orders, and then worked so hard to catch up that his feet perspired freely and then froze on the way home. The court held the injury "was proximately caused by accident," saying: "If the claimant while engaged in his work had wet his feet by stepping into a spring and freezing had resulted therefrom, it could scarcely be claimed that the injury was not proximately caused by accident."²¹

An employee, engaged in carrying coal from a wagon into customer's houses, had his toes and fingers frostbitten, making necessary the amputation of some of his fingers. It was held that the injury was accidental and arose out of the employment.²²

A janitor froze his big toe while intermittently for 1½ hours shovelling snow and attending to a fire in a furnace. The freezing of the toe resulted in the amputation of his leg. This was held to be an accident, as the employee was more exposed to the

19. *State ex rel. Virginia & Rainy Lake Co. v. District Court St. Louis Co.*, 138 Minn. 131, 164 N. W. 585 (1917).

20. *McMahaman's Case*, 224 Mass. 554, 113 N. E. 287, 12 N. C. C. A. 313.

21. *Ellingson Lumber Co. v. Industrial Comm. of Wis.*, 168 Wis. 227, 169 N. W. 568, (1918); 3 W. C. L. J. 215, 17 N. C. C. A. 1003.

22. *Days v. Trimaber & Sons*, 176 N. Y. App. Div. 124, 162 N. Y. Supp. 603.

risk of freezing than the generality of workers, and the added risk was because of the character of the employment.²³

An employee came home in the evening from work with his feet frozen. There was conflict in the testimony as to in which department of the defendant's plant he had worked. The court held that under the evidence, the frozen foot, which resulted in the employee's death might have been frozen while at work, while going to work, or any one of numerous places. The judgment for the plaintiff was reversed.²⁴

While rolling logs in the woods on an exceptionally cold day, a log roller froze his toes. It was held that he suffered an accidental injury.²⁵

An employee who froze his fingers while harvesting ice when the temperature was 30° below zero, suffered an accidental injury.²⁶

Where a workman froze his fingers on a moderately cold day there being no sudden drop in temperature, and he was exposed to only ordinary risk of the community, it was held that he did not suffer an accidental injury.²⁷

Generally injuries suffered from so called acts of God, such as freezing, do not constitute accidental injuries unless the injured workman is exposed to greater risk of freezing than are the ordinary persons of the community.²⁸

Where a workman was employed at carting ashes in an exposed place on an exceptionally cold day, his exposure being greater than the exposure of the community, and his hands became frozen while doing such work, he suffered a compensable injury.²⁹

23. *State ex rel. Nelson v. District Court Ramsey Co.*, 164 N. W. 917, 138, Minn. 260, 1 W. C. L. J. 97.

24. *Davis v. Fowler Packing Co.*, 101 Kan. 769, 168 Pac. 1111.

25. *Link v. Millard*, 4 N. Y. St. Dep. Rep. 385.

26. *Cole v. Callahan & Sperry*, 4 N. Y. St. Dep. Rep. 348.

27. *Ketron v. United Railroads of San Francisco*, 1 Cal. I. A. C. Dec. 528; *Laspada v. Public Service Ry. Co.*, 38 N. J. L. J. 102.

28. *Fensler v. Associated Supply Co.*, 1 Cal. I. A. C. Dec. 447.

29. *D. J. Shanahan v. Clifford E. Minor*, 2 Conn. C. D. 622; *Wm. Rainy v. The Tunnel Coal Co.*, 2 Conn. C. D. 646; *In re Robert v. L. Cameron*, 2nd A. R. U. S. C. C. 202; *In re Walter Frost*, 2nd A. R. U. S. C. C. 203; *In re Oma G. Dixon*, 2nd A. R. U. S. C. C. 204.

Where an insurance solicitor froze his nose while driving twenty miles in the regular course of his business on an exceptionally cold day, from which he contracted erysipelas and died, it was held to be an accidental injury, and was compensable.³⁰

An employee engaged in one of defendant's power sub-stations, was frozen to death in a snow storm in the mountains, where he had voluntarily gone with another employee. The court held that his dependents were entitled to death benefits as for accidental death.³¹

Where a coal shoveler's employment required him, on a very cold day to shovel coal in a coal yard outdoors, from seven o'clock in the morning until seven o'clock in the evening, with the exception of one hour for lunch, whereby he froze his fingers, the court held that he was exposed to greater risk of being frozen than ordinary outdoor workmen, and suffered a compensable injury.³²

Where an employee was required to stand in snow two feet deep for two hours passing lumber to another employee inside a building, it was held that he was especially exposed to the danger of frostbite and that subsequent amputation of his toes was the result of an accident and compensable.³³

Under the Federal Act compensation was allowed to a mail carrier for disability from freezing due to a depressed circulation resulting from taking aspirin or some other coal tar product for rheumatism.³⁴

§ 193. **Friction Injuries.**—Where on account of an abrasion on the thumb, sustained through the use of a chisel, microbes,

30. *Margaret Larke v. John Hancock Mutual Life Insurance Co. et al.*, 90 Conn. 303, 97 Atl. 320, 12 N. C. C. A. 308.

31. *Young v. Northern California Power Co.* 1 Cal. Ind. Acc. Com. 88, 12 N. C. C. A. 309.

32. *Doherty v. Employers Liability Assur. Corp. Ltd.*, 2 Mass. Workman Comp. Cas. 661, 12 N. C. C. A. 312.

33. *Gillis v. Maryland Casualty Co.*, 3 Mass. Workman Comp. Cases 307.

34. *In re Thomas Buckley*, 2nd A. R. U. S. C. C. 201.

entered, causing blood poisoning and death, the death was held to be the result of an accident arising out of the employment.³⁵

Where an employee suffered an abrasion and abscess, caused by pressing her forefinger against heads of pins while pinning shirts in a laundry, the abscess was held to be the result of accidental injury.³⁶

Where the doing of a particular piece of work requires constant twisting of the arms, the swelling of the elbow joint caused thereby is an accidental injury.³⁷

Where the palm of an employee's hand became inflamed and swollen from the rubbing of a shovel handle against the hand, but which caused no scratch, cut or abscess, it was held that the disability did not result from an accidental injury.³⁸

A disease known as "beat hand" or "beat knee" common to miners and acquired gradually by continued friction, is held not to be an accidental injury.³⁹

Paralysis, gradually acquired from riding a tricycle, incapacitating the employee from work, is not a personal injury by accident.⁴⁰

Under the Federal Act, abscess and blind fistula, brought on by sitting on cold iron, are not compensable.⁴¹

Applicant claimed that on March 31, while engaged in cleaning red oxide drums, her thumb was poisoned as the result of the work, that her thumb became sore, though she worked for five days after that, and on April 8th went to a hospital and had an operation performed for septic poisoning. A physician testified that red oxide would not injury anyone. The court found that the disability was not occasioned by accident, and denied compensation.⁴²

35. *Fleet v. Johnson & Sons*, 6 B. W. C. C. 60 C. A.; *State Industrial Comm. v. Tolhurst Mach. Works*, 184 N. Y. S. 608, 7 W. C. L. J. 136.

36. *Smith v. Munger Laundry Co.*, 1 Cal. Ind. Acc. Com. (part 1), 168.

37. *Tracy v. DeLaval Separator Co.*, 7 N. Y. St. Dep. Rep. 385; *In re Walter C. Curtis*, 3rd A. R. U. S. C. C. 113.

38. *Potter v. City of Brawley*, 3 Cal. Ind. Acc. Com. 210.

39. *Marshall v. East Holywell Coal Co.*, 7 W. C. C. 19.

40. *Walker v. Hockney Bros.*, 2 B. W. C. C. 20.

41. *Re Andrew Wilkes*, Op. Sol. Dep. C. & L. 175.

42. *Miller v. Jensen & Nicholson, Ltd.*, (1918), W. C. & Ins. Rep. 51.

§ 194. **Gangrene from Wound.**—Where Gangrene, resulting from a crushed toe, spread over the body, causing death, it was held that the death resulted from the accidental injury.⁴³

When the immediate cause of the death of an employee was gangrene, which developed from an injury to the foot, the court held that death resulted from the accidental injury.⁴⁴

Gangrene resulting from injury, caused by the dropping of a heavy weight upon the foot, was due to the accident.⁴⁵

§ 195. **Gastric Ulcer.**—Where a Chauffeur, suffering from a gastric ulcer, was cranking his employer's automobile and immediately afterwards the ulcer punctured the lining of the stomach, as such ulcers, according to medical testimony, are liable to do, the court held that the exertion was not the cause of the injury, but only the occasion, and compensation was denied.⁴⁶

§ 196. **Headaches from Eye Injury and Other Causes.**—“A claim is made that the claimant is prevented from working on account of headaches. It is of course quite possible that these headaches proceed from the injury, and it is not affirmatively shown that they do not proceed from the injured eye. However, the burden of proving the connection between the injury and the incapacity rests upon the claimant.

“It is not permissible for the commissioner to guess in this connection. The danger of guessing is illustrated perhaps by headache cases better than by others. Headaches come from a multitude of causes, and it may be the barest coincidence that there has been an injury to the eye, I cannot therefore do otherwise than overrule the claim.”⁴⁸

A workman who was compelled to exert himself lifting heavy weights, complained of headaches to his foreman, and medical

43. *Meyer v. Pacific Light and Power Co.*, 1 Cal. Ind. Acc. Com. (Part II), 333.

44. *In re Wilson*, 1 Bull. Ohio Ind. Com. 84.

45. *Stinton v. Brandon Gas Co.*, 5 B. W. C. C. 426.

46. *Chenoweth v. Mitchell*, 2 Cal. Ind. Acc. Com. 96.

48. *Stampick v. American Steel and Wire Co.*, 1 Conn. Comp. Dec. 474.

evidence tended to establish the fact that the headaches were produced by the strain. The court held this to be a compensable injury.⁴⁹

§ 197. **Heart Disease.**—A. CASES IN WHICH COMPENSATION WAS AWARDED: A laborer received a blow over the heart, and later died. A physician testified that a blow over the heart would cause acute disease, and in deceased's case, brought on a condition known as "pericarditis," causing death. It was contended that death was not the result of accident but of disease; but the court held that the evidence supported a finding that death resulted from the accidental blow.⁵⁰

A workman employed as cook on a lighter was suffering from valvular disease of the heart. In an attempt to save clothes and a surveying instrument from a sinking vessel, he so aggravated the disease by his exertions and excitement that he died. It was held that death resulted from an accident that arose out of and in the course of his employment.⁵¹

Where an employee collapsed while carrying a heavy load, and died from heart disease, the court held that the failure of the heart action was due to the overexertion, and awarded compensation for the death.⁵²

A woman, compelled to overexert herself while pulling carpet in a manufacturing establishment, aggravated a previous condition of weak heart, thereby totally incapacitating herself for work. The court held this to be an accidental injury, and compensable.⁵³

49. *Flaherty v. Locomobile Co. of America*, 1 Conn. Comp. Dec. 354.

50. *Bucyrus Co. v. Townsend*, 64 Ind. Ap. —, 117 N. E. 656, 15 N. C. C. A. 646, 1 W. C. L. J. 166.

51. *In re Brightman*, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321; 8 N. C. C. A. 102.

52. *In re Fisher*, 220 Mass. 581, 108 N. E. 36, 11 N. C. C. A. 176; *In re Gibbons* 181 N. Y. App. Div. 142, 168 N. Y. Supp. 412, 15 N. C. C. A. 525, 1 W. C. L. J. 697; *Tracy v. Phil & Reading Coal & Iron Co.*, — Pa. —, (1921), 112 Atl. 740.

53. *In re Madden* 111 N. E. 379, 222 Mass. 487, 14 N. C. C. A. 538; *In re Raymond F. Baker*, 2nd A. R. U. S. C. C. 156.

Where a man, suffering from cardiac lesion, aggravated this condition by a heavy and unusual strain, and death resulted, the court said that this might be considered as accidental and within the compensation act.⁵⁴

A night watchman, suffering from heart disease, became excited while fighting fire, and died of heart failure. His death was held to be accidental.⁵⁵

An electrotpe finisher was found dead in a chair in a saloon, where he had gone after the day's work. Medical testimony established that he was suffering from angina pectoris caused by overwork and the climbing of many stairs throughout the previous twenty one hours. It was held that death was due to an accidental injury occasioned by the employment and compensable.⁵⁶

Where an electric shock precipitates an employee against a work bench with such force as to cause unusual acceleration, force and pressure in the action of the heart, resulting in paralysis, it was held to be a personal injury within the act.⁵⁷

A car shop employee, who had been struck in the abdomen by a piece of iron, was known before the accident to be in a precarious condition from valvular trouble of the heart. He quit work, and died of heart trouble about nine weeks later. Physicians testified that he might have lived ten to twenty years, had it not been for the accident. Compensation was awarded.⁵⁸

Where an employee slipped and fell while descending a stairway, evidence tending to show that he had been suffering from heart disease and other troubles, and that a fall would likely cause death, was held sufficient to sustain a finding that the employee suffered an accident at the plant.⁵⁹

54. *Uhl v. Guarantee Const. Co.*, 174 N. Y. App. 571, 161 N. Y. Supp. 659, 14 N. C. C. A. 546; *Broliski v. Nichols Copper Co.*, 171 N. Y. App. 959, 155 N. Y. Supp. 1096. .

55. *Schroetke v. Jackson-Church Co.* 193 Mich. 616, 160 N. W. 383.

56. *McMurray v. Little and Ives, Co.*, 3 N. Y. St. Dep. Rep. 395.

57. *Milliken v. U. S. Fidelity Co.*, 1 Mass. I. A. Bd. 187.

58. *Cook v. N. Y. C. & H. R. R. Co.*, 179 N. Y. App. Div. 967, 166 N. Y. S. 1090.

59. *Sulberger and Sons Co. v. Ind. Com.*, 285 Ill. 223, 120 N. E. 535.

Death from heart trouble brought on by strenuous work of pitching dust-laden alfalfa is compensable despite the fact that the deceased was suffering from a diseased condition of the heart, since the dust arising from the alfalfa was the proximate cause.⁶⁰

Where an employee fell into a well hole, striking against a center pole, producing a contusion of his right side, later developing acute pericarditis, which caused his death, the court held that death resulted from heart disease which was the result of the accident and compensation was awarded.⁶¹

Where heart disease was brought on by a strain, received while lifting, and later death resulted from the heart disease, the death was held to have resulted from the accident.⁶²

(B) CASES IN WHICH COMPENSATION WAS DENIED.

Where an employee working on the street received a blow in the side from a shovel, knocked out of his hand by a passing automobile and death resulted later from adherent pericarditis, and the medical testimony showed that he was afflicted with myocarditis, that is, inflammation of the muscular tissues of the heart, and that deceased died primarily of inanition, and that the accident, if it had any relation at all to the death, had at most a trivial and inconsequential relation, and could not be looked upon as the cause of the death, compensation was denied.⁶⁴

60. *Caroll v. Indus. Comm.*, —Colo. —, (1921), 195 Pac. 1097.

61. *La Fleur v. Wood*, 178 N. Y. App. Div. 397, 164 N. Y. S. 910.

62. *Gibbons v. Marx & Rauolle*, 181 N. Y. App. Div. 142, 168 N. Y. S. 412; *Santa v. Indus. Acc. Comm.*, 175 Cal. 235, 165 Pac. 689.

Additional Cases in Which Compensation was Awarded.

Doughton v. Alfred Hickman, Ltd., (1913). W. C. & Ins. Rep. 143, 6 B. W. C. C. 77, 8 N. C. C. A. 103; *Clover Clayton & Co. v. Hughes*, 1910 A. C. 242, 3 B. W. C. C. 275, 2 B. W. C. C. 15; *Western Electric Co. v. Industrial Board*, 285 Ill. 279, 120 N. E. 774; *Madden's Case*, 222 Mass. 487, 111 N. E. 379; *LaVeck v. Parke, Davis & Co.*, 190 Mich. 604, 157 N. W. 72; *Wiemert v. Boston Elev. Ry.*, 216 Mass. 598, 104, N. E. 360; *Gherdi v. Connecticut Co.*, 1 Conn. Comp. Cases, 81; *Otot v. Amer. Mutual Liability Ins. Co.*, 2 Mass. I. A. B. 254; *Hackford v. Beeder & Brown*, 176 N. Y. App. Div. 924, 162 N. Y. S. 1122; *Gotdon v. Eastman Kodak Co.*, 181 N. Y. App. Div. 909.

64. *Farrish v. Nugent*, 1 Cal. Ind. Acc. Com. 98; *Waldman v. Hermann*, 1 Cal. Ind. Acc. Com. 82, 11 N. C. C. A. 178.

A bus driver fell from his bus and died immediately afterward. The case was decided on medical evidence alone, and the court held that it was more probable that death was caused by sudden fatal heart attack than that it was caused by an accidental fall aggravated by the state of the heart. In any event death was not due to an accident and compensation was denied.⁶⁵

Deceased was loading stock on an elevator when the elevator started up. The elevator was stopped, and stock replaced, and deceased wheeled it about forty feet, when he dropped dead. Physicians testified that the death was due to fright caused by sudden starting of the elevator. The court held that where death results from fright or worry unaccompanied by any immediate physical injury it is not compensable.⁶⁷

Where an employee was found dead near a baling press, and there was no evidence proving accident or accidental injury, the claim being that the heavy work that deceased was doing hastened his death by heart or kidney disease, there could be no recovery.⁶⁸

An employee suffering from accidental injury, died from heart disease due to uremic poisoning. It was held that the injury had no causal relation to the death and compensation was refused.⁶⁹

In a Michigan case, where the employee died of a rupture of the right auricle of the heart, while in the course of his work of lifting and pulling rolls of wire, weighing 150 to 160 pounds, the court said: "The man died while doing the work he agreed to do, in the way he intended to do it. The exercise accounts for his death, and if he had been informed about the condition of his heart, he must have known that death was likely to result, at any time, from any considerable physical exercise. There is no evidence of mischance or miscalculation in what was being done, none of anything fortuitous or unexpected in the manner of doing it. There is undisputed evidence that he had a chronic trouble—dis-

65. *Thackway v. Connelly & Sons*, 3 B. W. C. C. 37, 8 N. C. C. A. 106.

67. *Visser v. Michigan Cabinet Co.*, Mich. Ind. Acc. Bd. Dec. (No. 3, 1913), 24, 10 N. C. C. A. 1042; *O'Connell v. Adirondack Elect. Power Corp.*, — N. Y. App. Div. (1920), —, 185 N. Y. S. 455, 7 W. C. L. J. 353.

68. *Jakub v. Ind Comm.*, (Ill.) 123 N. E. 263, 4 W. C. L. J. 153.

69. *Lynch v. Travelers Ins. Co.*, 2 Mass. Ind. Acc. Bd. 591.

ease—of the heart, of long standing, the wall of one auricle being so thin that 'any exertion at all might have been the cause of its breaking.' Death was merely hastened by the exertion.²⁷⁰

§ 198. **Hemorrhage**.—Where the claimant and his brother were lifting a heavy barrel of jelly when, for some reason, the brother slipped, allowing the whole weight of the barrel to be thrown suddenly upon the claimant while in a stooping position, causing the claimant to suffer a hemorrhage in the lumbar region

70. *Stornbaugh v. Peerless Wire Fence Co.*, 164 N. W. 537, 15 N. C. C. A. 635; *Collins v. Brooklyn Union Gas Co.*, 171 N. Y. App. Div. 381, 156 N. Y. S. 957, 15 N. C. C. A. 647.

ADDITIONAL CASES IN WHICH COMPENSATION WAS DENIED.

71. *Johnson v. Mary Charlotte Min. Co.*, 199 Mich. 218, 165 N. W. 650, 15 N. C. C. A. 647, 1 W. C. L. J. 393; *Coe v. Fife Coal Co.*, 46 Scotch L. R. 325, 2 B. W. C. C. 8, 8 N. C. C. A. 102; *Black v. New Zealand Shipping Co.*, 6 B. W. C. C. 720, (1913), W. C. & Ins. Rep. 480, 8 N. C. C. A. 102; *Ritchie v. Kerr*, — S. C. 613, 50 Sc. L. R. 434, 6 B. W. C. C. 419, (1913), W. C. & Ins. Rep. 297, 8 N. C. C. A. 102; *Tradder v. T. M. Lennard & Sons, Ltd.*, 4 B. W. C. C. 190, 8 N. C. C. A. 104; *Ohara v. Hayes*, 44 I. L. T. 71, 3 B. W. C. C. 586, 8 N. C. C. A. 104; *Spence v. William Baird & Co., Ltd.*, 1912 S. C. 343, 49 Sc. L. R. 278, 5 B. W. C. C. 542, W. C. Rep. 18, 8 N. C. C. A. 104; *Hawkins v. Powell's Tillery Steam Coal Co.*, 1 K. B. 988, 80, L. J. K. B. 769, 104 L. T. 365, 27 T. L. R. 282, 55 Sol. J. 329, 4 B. W. C. C. 178, 8 N. C. C. A. 104; *Beaumont v. Underground Elec. Rys. Co. of London* 1912 W. C. Rep. 123, 5 B. W. C. C. 247, 8 N. C. C. A. 105; *Powers v. Smith*, 3 B. W. C. C. 470; *Hallett v. Jevne Co.*, 2 Cal. I. A. C. 259; *In Re Stith*, Ohio Ind. Comm. No. 24574 11 N. C. C. A. 180; *Nolan v. N. Eng. Cas. Co.*, 2 Mass. Ind. Acc. Bd. 417; *Ohara v. Employer's Liability Ins.*, 2 Mass. Ind. Acc. 369, 11 N. C. C. A. 178; *In re Roland K. Chambers*, 3rd A. R. U. S. C. C. 124; *In re Chas. J. Petterson*, 3rd A. R. U. S. C. C. 124; *In re Richard Morrissey*, 2nd A. R. U. S. C. C. 161; *In re Peter Sweeney*, 2nd A. R. U. S. C. C. 163; *Lightbown v. American Mutual Liability Assur. Corp.* 2 Mass. Ind. Acc. Bd. 243, *Amesbury v. Vacuum Oil Co.*, 9 N. Y. St. Dep. Rep. 339; *Grant v. Morse Dry Dock & Repair Co.*, 9 N. Y. St. Rep. 401; *Re P. C. Weil Op. Sol. Dep. C. & L. P.* 453; *Welch v. Employer's Liability Assur. Co.*, 1 Mass. Ind. Acc. Bd. 173; *Tucillo v. Ward Baking Co.* 180 N. Y. App. Div. 302; *Margaret Bush v. Lamsville Water Co.*, Ky. W. C. Bd. L. D. Ind. Rep. 152, 1919.

of the spine, the court held that the subsequent disability was the result of an accidental injury.⁷²

The plaintiff, a steam fitter's helper, while engaged in tending a boiler for his employer attempted to move two steel beams, resting about three feet from the floor, by pushing his body against them. He did this once or twice when he became sick and had to sit down. He later vomited blood and was unable to work thereafter. It was held that he suffered an accident.⁷³

Where a workman was engaged in swinging a fifteen pound hammer for one and one-fourth hours in the forenoon and thirty minutes in the afternoon, after which he began to operate an overhead traveler, and while doing this he fell over a pile of stone, striking his head, the court held that his subsequent death from cerebral hemorrhage was the result of an accidental injury.⁷⁴

Where a mason's helper, 59 years of age, was engaged in pushing a wheel barrow and tools, weighing 150 pounds, up a steep grade for the distance of one and a half blocks, over an alley which was rough and wet, collapsed, and subsequently died as the trial court found, "due to the muscular strain and exertion employed by him in propelling the wheelbarrow," which caused the sudden rupture of a blood vessel, the court held that the deceased's death was the result of a compensable accident.⁷⁵

Claimant's husband was employed by defendant, and while in the cellar of a new building under construction he collapsed and fell. He died a few days later of a blood clot and pressure on the brain. Evidence showed that he fell on a dirt floor, and there was nothing to indicate that he had tripped or fell over anything. The only visible sign of an injury was a slight scratch on his cheek and a small abrasion on his forehead. The court reversed the

72. *Schmidt v. O. K. Baking Co.*, 90 Conn. 217; 96 Atl. 963, 14 N. C. C. A. 539; *Kiercok v. Phil. & Reading Coal & Iron Co.*, — Pa. —, 1921, 112 Atl. 746.

73. *Manning v. Pomerene*, 101 Neb. 127, 162 N. W. 492, 14 N. C. C. A. 536.

74. *State ex rel. Simmers et al. v. District Court of Stearns County*, 137 Minn. 318, 14 N. C. C. A. 527, 163 N. W. 667.

75. *State ex rel. Puhlmann v. District Court, Brown County*, 137 Minn. 30, 162 N. W. 678, 14 N. C. C. A. 545.

award of compensation, saying that it was based on mere guess or conjecture.⁷⁶

A workman's employment required him to break rock in a quarry with a 16-pound sledge and load the rock into a car. Shortly after he was seen breaking large rock with his sledge, he suffered a pulmonary hemorrhage, from which he died before medical aid could reach him. The court reversing the decision of the District court, held that the facts indicated an accidental injury arising out of the employment.⁷⁷

Temporary blindness due to hemorrhagic spots in the retina of the eye of an employee, following exposure to intense bright light, was held to be due to natural causes, and not an accident arising out of the employment.⁷⁸

Where a fireman, working in a stoke hole, drank a large quantity of water, causing a hemorrhage, it was held that he suffered an accidental injury, for which compensation would be allowed.⁷⁹

Where a strain caused internal hemorrhage from which the employee died, it was held that the death was the result of an accidental injury, but on appeal the Supreme court of California held that there was no evidence to justify this finding and the award was annulled.⁸⁰

§ 199. **Hemorrhoids.**—Where a hod carrier, carrying a hod up an incline, slipped and fell against a building, it was held that, even though the exertion might have caused the internal hemorrhoids to become external, this was not an accidental injury for which compensation could be allowed.⁸¹

Where claimant felt a sudden pain in the region of the rectum caused by the strain of lifting the handles of a heavily loaded

76. *Hansen v. Turner Const. Co.*, 224 N. Y. 331, 120 N. E. 693.

77. *Gilliland v. Ash Grove Lime & Portland Cement Co.*, 104 Kas. 771, 180 Pac. 793, 4 W. C. L. J. 187.

78. *Crouch v. Ritter*, 2 Cal. I. A. C. 702.

79. *Johnson v. Owens S. S. Torrington*, 3 B. W. C. C. 68.

80. *Englebreton v. Indus. Acc. Com.*—Cal.—, 151 Pac. 421, 10 N. C. C. A. 545.

Note: For further bases see Cerebral hemorrhage, hemorrhage under the "arising out of" chapter, Injuries to eye, and Aneurism.

81. *Truby v. Jackson*, 3 Cal. Ind. Acc. Com. 69.

truck and it was found that the strain caused hemorrhoids, the court held that the hemorrhoids were due to an accidental injury.⁸²

Aggravation of existing hemorrhoids from straining and lifting is a compensable injury under the Federal Act.⁸³

§ 200. **Hernia.**—An employee, in lifting, severely strained his body, causing the protrusion of an intestine into an existing hernia sac or aperture. It was contended that the employee was afflicted with a disease or disabling condition which rendered him susceptible to injury upon exposure to "some slight accident" either within or outside his employment. The court said "This furnishes no ground for holding that the disease or condition rather than the accident was the proximate cause of the injury upon which the award for disability is based." * * * ⁸⁴

An employee working as stevedore ruptured himself on March 29th. On April 2nd he was operated on, and left the hospital on April 14th in an emaciated condition. On September 22nd he entered an infirmary, and on December 12th died of pulmonary tuberculosis. On appeal the court declined to interfere with the finding of fact by the county court judge to the effect that the rupture and operation were not the cause of the tuberculosis which resulted in death.⁸⁵

A rupture caused by a strain while the employee is at work, is an accident or untoward event and as such, compensable.⁸⁶

"The presence of a structural weakness or actual pain, antedating the injury alleged, in the region where the injury occurred, does not preclude a recovery if the injury, itself is distinct and the

82. *Hallock v. The American Steel & Wire Co.*, 2 Conn. W. C. C. 320.

83. *In re Trevor L. Hill*, 2nd A. R. U. S. C. C. 200.

84. *Puritan Bed Springs Co. v. Wolfe* (Ind. App.), 120 N. E. 417 (1918), 17 N. C. C. A. 872, 3 W. C. L. J. 39.

85. *Kemp v. Clyde Shipping Co. Ltd.*, 119 L. T. R. 131, (1918), 17 N. C. C. A. 875.

86. *Poccardi v. Public Service Comm.*, 75 W. Va. 542, 84 S. E. 242; *Jordan v. Decorative Co.*, — N. Y. App. —, 130 N. E. 634, 1921.

result of a particular strain causing a sudden protrusion of the intestine.⁷⁸⁷

“While an employee was lifting bundles of paper weighing from 40 to 60 pounds, which work he had done regularly every day for 7 years, he felt a pain which indicated to his physician, upon examination, that he had sustained a rupture. There was no blow or unusual exertion, nothing out of the ordinary to suggest to the employee that anything he then did caused the pain. * * * No attempt was made to prove that the lifting could have produced the rupture which later developed. Hernia is a disease arising out of natural causes as well as from accident, and it was therefore incumbent upon the claimant to offer some evidence that the employment caused or could have caused the injury.”⁷⁸⁹

Where an employee's rupture was caused by an attempt to move a 600 pound gas engine, the injury was held to be accidental, though the strain caused the rupture because the tissues were weak and not normal.⁸⁰

Compensation was denied for the death of a workman due to strangulation of hernia, alleged to have been brought on by a fall. Evidence showed that the workman sustained a fall but failed to show that the fall in any way caused or accelerated the rupture.⁸⁰

Hernia caused by violent coughing is not compensable in the absence of a showing that the cold, which caused the coughing spell, was brought on by unusual exposure.⁹¹

Compensation was denied on the ground that it was not an “accidental injury” where applicant, a civil engineer, in the perform-

87. *Bell v. Hayes Ionia Co.*, 192 Mich. 90, 158 N. W. 179; *Casper Cone Co. v. Industrial Comm.* 165 Wis. 255, 161 N. W. 784, 14 N. C. C. A. 537; *Hurley v. Selden-Breck Const. Co.*, 193 Mich. 197, 159 N. W. 311, 14 N. C. C. A. 529.

88. *Alpert v. Powers*, 223 N. Y. 97, 119 N. E. 229, 2 W. C. L. J. 106, 17 N. C. C. A. 783.

89. *Robbins v. Original Gas Engine Co.*, 191 Mich. 122, 157 N. W. 437, 14 N. C. C. A. 530; *In re Otto Gjorud*, 2nd A. R. U. S. C. C. 107; *In re Edward Adair*, 2nd A. R. U. S. C. C. 109.

90. *Marshall v. Sheppard* (1913), 6 B. W. C. C. 571; *In re James Mikolasek*, 2nd A. R. U. S. C. C. 106.

91. *In re Geo. L. Schneider*, 3rd A. R. U. S. C. C. 118.

ance of his duties, lifted a heavy block of timber, at which time he felt a sharp burning pain in his right groin, though he did not slip or fall nor did the timber he was lifting, in any manner strike him, and it was 10 days later before he noticed a swelling at or about the place he felt the burning pain. The court said: "Nothing out of the ordinary happened, because he had lifted such timbers before, when such action was necessary in the performance of his duties; and down to the time of the hearing he had remained at work continuously. It seems to us that these facts conclusively show that claimant did not receive an accidental injury within the meaning of the act."⁹²

Where the deceased suffered from chronic myocarditis prior to an operation, performed for the relief of a hernia, and he died from this disease 6 weeks after the operation, an award in favor of deceased's widow was reversed, where the evidence did not sustain the allegation that the effects of the operation were the cause of his death.⁹³

In denying compensation to an employee, who, while lifting an iron beam weighing between 30 and 90 pounds, and which he had occasion to lift as many as 100 times a day, sustained a rupture on one of these occasions, the court said: "We are of the opinion that an employee who receives an injury in the nature of a hernia, while engaged in his usual and ordinary employment, without the intervention of any untoward or accidental happening, is not within the provisions of the compensation act, which as we have held provides compensation for accidental injuries only."⁹⁴

The duties of an employee of a school district required him to lift, carry and throw cord wood into furnaces. He went from his house to the school, on the day of the injury, in good health. Upon his return he was found to be suffering from a hernia. When submitting to an operation it was discovered that he was

92. *Tackles v. Bryant & Detwiler*, 200 Mich. 350, 167 N. W. 36, 17 N. C. C. A. 789, 1 W. C. L. J. 1031.

93. *Tucillo v. Ward Baking Co.*, 180 N. Y. App. 302, 167 N. Y. Supp. 666, 15 N. C. C. A. 637, 1 W. C. L. J. 439.

94. *Kutschmar v. Briggs Mfg. Co.*, 197 Mich. 146, 163 N. W. 933, 15 N. C. C. A. 523.

suffering from another hernia of previous origin. An operation was performed for the two and infection resulted in both wounds, causing death. It was contended that it was not shown which wound became infected. In disposing of this contention, the court, after briefly referring to the evidence, said that it was a reasonable conclusion to draw that both incisions were infected during the operation and that the fatal blood poisoning would have taken place even if the injured man had only been operated upon for the injury arising from the accident. The court stated the general rule, namely: "If an accident necessitates an operation and death ensues, even though it is not a natural or probable consequence, the death may, if the chain of causation is unbroken, be said to have in fact resulted from the injury."⁹⁵

Where the wife of an "engine tamer" sought compensation for the death of her husband, following an operation for a hernia, alleged to have resulted from a strain received in the course of the employment, compensation was denied because of lack of any direct or circumstantial evidence to prove that the hernia was due to an accident received during his employment. The court said: "Declarations made by one injured to his attending physician are admissible in evidence when they relate to the part of his body injured, his suffering, symptoms, and the like, but not if they relate to the cause of the injury."⁹⁶

Where an employee aggravated two hernias by straining the muscles of his back while lifting a heavy steel girder, and death resulted later, the trial court found that the death was due to the accident, which finding was held to be conclusive.⁹⁷

95. *Eddles v. School District of Winnipeg No. 1*, 22 Manitoba 240, 21 W. L. R. 214, 2 W. W. R. 265, 2 Dom. L. R. 696, (1912), 14 N. C. C. A. 542

96. *Chicago & A. R. Co. v. Indus. Bd. of Ill.*, 274 Ill. 336, 113 N. E. 629, 14 N. C. C. A. 541.

97. *New York Switch and Crossing Co. v. Mullenbach*, 92 N. J. L. 254, 103 Atl. 803, 2 W. C. L. J. 346; 17 N. C. C. A. 865; *Gartner v. N. Y. Dairy Produce Co.*, 179 N. Y. App. Div. 950; *Coons v. Endicott Johnson & Co.*, 181 N. Y. App. Div. 963, 168 N. Y. S. 1105; *Bellafore v. Roman Bronze Works*, 181 N. Y. App. Div. 910, 167 N. Y. S. 1088; *Fleming v. Robert Gair Co.*, 176 N. Y. App. Div. —, 162 N. Y. Supp. 298, 14 N. C.

Claimant alleged that he strained himself while lifting rock and suffered an internal rupture and hernia. The arbitration board refused compensation on the ground that it was not satisfied that the hernia was not present at the time the claimant alleged that he strained himself. On appeal, the court held that there was no evidence of a pre-existing hernia, nor any condition which would support the contention that a hernia had existed and that it was aggravated by the strain, which according to the only evidence given, had taken place. Compensation was allowed.⁹⁸

Where a brewery assistant strained himself while lifting a cask, which resulted in a rupture in the same place where there was a rupture some years previous, the court held that this new rupture was due to the accidental strain, and compensation was allowed.⁹⁹

Where a trial court found that an employee had sustained a femoral hernia as the result of an accident, and that the injury was permanent unless relieved by an operation, it should have allowed compensation for a permanent injury, with leave to the employer to apply for a modification of the order if the employee unreasonably refused to submit to an operation.¹

An employee claimed to have accidentally received a strain because of being compelled to sustain a heavy weight, which resulted in a left inguinal hernia. At the time he made no claim of the injury, as he felt no pain. The commission briefly reviewed the evidence and dismissed the claim on the grounds that a traumatic hernia is accompanied with sufficient pain to make its appearance

C. A. 543; *Scales v. West Norfolk Farmers' Manure & Chem. Co.*, 1913, W. C. & Ins. Rep. 165, 3 N. C. C. A. 277.

98. *Cozoff v. Welsh*, 18 Dom. L. R. 8, 28 W. L. R. 449, 1914, 14 N. C. C. A. 540.

99. *Brown v. Kemp*, 6 B. W. C. C. 725, 14 N. C. C. A. 535; *Boggelyn v. Coronada Hotel & Frankfort Gen. Ins. Co.* 1 Cal. Ind. Acc. (part 2), 276.

1. *McNally v. Hudson & M. R. Co.*, 87 N. J. L. 455, 95 Atl. 122, 10 N. C. C. A. 185 *Yukanovitch v. Mass. Employees' Ins. Ass'n*, 2 Mass. Wkm. C. C. (1914), 787, 10 N. C. C. A. 188, *Kline v. Indus. Comm.* 101 Wash. 365, 172 Pac. 343, 2 W. C. L. J. 167.

known to the workman at the time it happens and a complaint should be made to someone at the time.²

An employee, apparently in good health, suffered from a strain while lifting, and two days later was found to be suffering from a rupture, necessitating an operation, which resulted in death. The medical testimony was to the effect that the rupture was caused by the lifting. It was held that the death was caused by an accident.³

Straining, blows and other accidents resulting in hernia, or aggravating previously existing conditions of hernia, are compensable. Hernia sometimes presents difficulties of evidence as to its cause, and calls for the testimony of surgical experts, the doubt being whether the hernia is traumatic or due to disease.⁴

Claimant sought compensation for a hernia, alleged to have been caused by an injury received while putting back the cover of the furnace. Medical testimony tended to show that the rupture was of long standing and that there was no indication of a recent injury. Compensation was denied on the ground that the burden of showing that the claimant was injured by accident, was not discharged.⁵

Where an incomplete hernia, sustained as the result of an injury, was rendered complete by the rough handling of a physician of the insurance carrier, it was held that the resulting disability was due to an injury.⁶

A fireman who suffered a hernia as the result of a fall, was

2. *Wilson v. Allis Chalmers Co.*, Wis., Ins. Com., 3rd Ann. Rep. 70, (1914).

3. *Poccardi v. Public Serv. Com.*, 75 W. Va. 542, 84 S. E. 242, 8 N. C. C. A. 1065; *Voorhees v. Smith-Schoonmaker Co.*, 86 N. J. L. 500, 92 Atl. 280, 7 N. C. C. A. 646; *Andreini v. Cudahy Packing Co. et al.* 1 Cal. Ind. Acc. Com. Dec. 8, 6 N. C. C. A. 390.

4. *Ulrich v. Lenox Coat Apron and Towel Supply Co.*, 3 N. Y. St. Dep. Rep. 380; 171 N. Y. App. Div. 958, *Mooney v. Weber Piano Co.*, S. D. R. Vol. 5, p. 396, August 11, 1915; 172 N. Y. App. Div. 917, January 18, 1916.

5. *Nagy v. Solvay Process Co.*, 201 Mich. 158, 166 N. W. 1033, 17 N. C. C. A. 252, 1 W. C. L. J. 1049.

6. *Clark v. Kennedy*, 3 Cal. I. A. C. 125.

allowed compensation during actual disability and for disability, following an operation.⁷

§ 201. **Housemaid's Knee.**—A plumber, while performing his ordinary duties, was compelled to rest upon his knees for long periods of time, which caused what is known as "Housemaid's Knee," a disease of the knee cap. This was held to be a compensable injury under the Connecticut act.⁸

§ 202. **Hydrocele.**—Where a delivery boy, after several falls from his bicycle, was operated upon for hydrocele, the existence of which was observed by the physician at the time of the first accident, the physician testifying that it was then admitted as having existed before that, the proof of accidental origin of the injury was insufficient, and compensation was refused.⁹

Where an employee slipped and fell injuring his testicle which developed into a hydrocele, he sustained a compensable injury under the Federal Act.¹⁰

§ 203. **Hydronephrosis of Kidney.**—A grocer's clerk undertook to lift a heavy sack of coffee and injured his back, necessitating an operation for a condition of hydronephrosis of the kidney. It was found that the applicant was suffering from a floating kidney prior to the injury but the stricture was the result of the lifting and caused a kink in the ureter. It was held that the disability was caused by the accidental injury sustained in the course of the employment.¹¹

§ 204. **Hysterical Blindness.**—Claimant sustained a blow on the head which impaired his vision, and for a long time after the wound in the head had healed claimant believed, because of neurotic conditions, that his eyesight was still impaired. It was

7. O'Brien v. Holmes, 37 N. J. L. J. 116. See also 6 N. C. C. A. 390, 406.

8. Roberts v. Hitchcock Hdw. Co., 1 Conn. C. Dec. 213.

9. Young v. Paris, 2 Cal. I. A. C. Dec. 518.

10. In re Mons Anderson, 2nd A. R. U. S. C. C. 113.

11. Walters v. Brune, 2 Cal. I. A. C. D. 249, 10 N. C. C. A. 770.

held that this condition was traceable to the accidental injury, and compensable.¹²

Where a girl was knocked down by a swinging door and total blindness resulted from a disability known as hysterical blindness, the injury was held to be due to an accident, and compensation for total disability was awarded.¹³

That the workman, but for want of sufficient will power, could have thrown off the condition of hysterical blindness and neurosis caused by the injury, did not deprive him of his right to compensation.¹⁴

§ 205. **Hysterical Paralysis.**—An axe fell 45 feet upon the right shoulder of applicant inflicting a ghastly wound. Prompt medical aid effected a healing of the wound, but the applicant was unable to use his arm, and professed a total paralysis of the arm and partial paralysis of the side although there was no physical derangement apparent. The accident board said, "While there is some difference of opinion among the physicians testifying as to whether or not the paralysis of applicant's arm is wholly functional and due to hysteria, all agree that, up to the time of giving their testimony, applicant Santini has suffered a total paralysis of the right arm and is unable to perform manual labor, and that he is not a malingerer. The difference between a malingerer and a hysteric is that the malingerer claims disability when he knows he has no right to do so, and the victim of hysteria claims disability in the unshakable conviction that he is disabled. In the language of Dr. McClenahan, an excellent authority on the subject, 'His injury is just as real to him as though it actually existed.'" Compensation was awarded for total disability.¹⁵

Where the disability immediately caused by an accident had been cured, but a condition of hysterical paralysis and nervous spasm, amounting to a traumatic neurosis, existed, compensation was

12. *Hurlowske v. American Brass Co.*, 1 Conn. W. C. D. 6.

13. *Boyd v. Y. M. C. A.*, 3 Cal. Ind. Acc. 62.

14. *In Re Hunnewell*, 220 Mass. 351, 107 N. E. 934.

15. *Santini v. Mammoth Copper Mining Co.*, 1 Cal. Industrial Acc. Comm. Dec. 161, 11 N. C. C. A. 32, note.

awarded pending disability, upon condition that if the sufferer should refuse hospital treatment at expense of the employer, compensation payments should be discontinued.¹⁶

Hysterical neurosis which comes as a result of an injury, entitles the one injured to compensation during the continuance of the disability arising from that cause.¹⁷

A woman, in an effort to avoid injury from a broken pulley flying from a machine, strained her left leg and fell against a machine, causing her to suffer from traumatic neurasthenia. It was held that even though this disease exists only in the mind of the sufferer as a hysterical condition she had no power to prevent this mental condition, and is entitled to compensation for the results of the accidental injury.¹⁸

Claimant received personal injuries in an automobile accident arising in the course of his employment, and developed traumatic neurosis, resulting in loss of will power. This was held to be a compensable injury.¹⁹

§ 206. **Infection.**—Where an employee's work caused his hands to become chapped and to bleed and while his hand was in this condition it became infected, the court held that it was not necessary to determine the exact source of the microbes that entered the hand, it being sufficient that the poisoned hand results from the injury, through the crack opening and becoming poisoned.²⁰

Claimant was employed as a strainer of mahogany. Through the use of aniline dye his hands became cracked, and infection resulted. Reversing the action of the board, the court said, "If the injury to the claimant occurred by reason of the character of his employment, he is precluded from recovery, because the act

16. *Ream v. Sutter Butte Canal*, 11 N. C. C. A. 1048, 2 Cal. Ind. Acc. Comm. 187.

17. *Linser v. Consumers Ice and Coal Co.*, Mich. Wkm. Comp. Cases (1916), 61.

18. *Lucy Brewster v. W. H. Hemingway & Sons Soap Co.*, 1 Conn. Comp. Dec. 128.

19. *Wm. R. Smith v. H. I. Smith*, 1 Conn. Comp. Dec. 628.

20. *Saddington v. Inslip Iron Co., Ltd.*, 1915, W. C. & Ins. Rep. 46, 17 N. C. C. A. 881; *State Industrial Comm. v. Tolhurst Mach. Co.*, 184 N. Y. S. 608, 7 W. C. L. J. 136.

does not provide compensation for those suffering injury from occupational diseases. The claimant has failed to show that the infection resulted from an accident.”²¹

Claimant, who submitted to vaccination against her will, developed acute mastoiditis, lymphatic infection. In reversing an award in her favor, the court said: “It seems quite clear that claimant has failed to show any connection between her employment and the infection following vaccination. There was nothing in her employment which made her more susceptible to the reception of the germ than if she were elsewhere. The risk of infection was such and such only as that to which the general public was exposed. Claimant’s injury, if it can be traced to the vaccination arose not out of her employment, but through the active agency of the Detroit board of health, which for the benefit of claimant as well as the public generally requested her to submit to the operation.”²²

Claimant was compelled to wade through impure flood water. At the time an old injury to his foot had not healed, and infection followed, rendering necessary the amputation of his foot. It was contended that the injury was not the result of an accident, but the court held that “the infection of an existing wound by contact with foreign matter seems to be within the ordinary meaning of the term, ‘an unlooked for, untoward event which is not expected or designed.’”²³

An iron worker injured his finger, and about a week later suffered a second injury to the same finger, and later blood poison caused his death. The evidence tended to prove that the injury did not break the skin, but the deceased had pricked it with a pin. The court, in affirming an award, said that the conflicting evidence would support a reasonable inference that an open wound was caused by one of the injuries and that blood poisoning resulted therefrom, rather than from a self-inflicted wound.²⁴

21. *Jerner v. Imperial Furniture Co.*, 200 Mich. 265, 166 N. W. 943, 17 N. C. C. A. 344, 1 W. C. L. J. 1066.

22. *Krout v. J. L. Hudson Co.*, 200 Mich. 287, 166 N. W. 848, 16 N. C. C. A. 881.

23. *Monson v. Battelle*, 102 Kan. 208, 170 Pac. 801, 17 N. C. C. A. 878.

24. *Bushe v. Whitehead & Kales Iron Works*, 194 Mich. 413, 160 N. W. 557, 15 N. C. C. A. 586; *Kinney v. Cadillac Motor Car Co.*, — Mich. —,

Where an employee accidentally forced a splinter into his hand and blood poisoning ensued, the arbitration board found that the blood poisoning was caused by infection entering through the wound made by the splinter, and therefore compensable.²⁵

Decedent contracted ivy poisoning while mowing weeds on defendants right of way. This later developed into blood poisoning and acute congestion of the lungs, from which he died. This was held to be an accidental injury and compensable.²⁶

Where an employee injured his hand while using a wheelbarrow and infection followed, causing blood poisoning, and later the employee became insane, it was held that the insanity was the result of the accidental injury, and compensation was allowed.²⁷

A coal miner, who had to kneel in the course of his work, found that a small piece of coal had worked itself into his knee, which later caused blood poisoning, resulting in death. This was held to be an accident, within the meaning of the English Workmen's Compensation Act.²⁸

Where compensation was sought for death from blood poisoning, alleged to have been caused by vaccination, which developed an abscess about the knee, compensation was denied, because it was not shown that the infection of the knee joint would result from the vaccination on the arm.²⁹

After an employee had been pulling a chain he experienced sharp stinging feeling at the base of the middle finger. Later blood

165 N. W. 651, 15 N. C. C. A. 586; *Dove v. Alpena Hyde and Leather Co.*, 198 Mich. 132, 164 N. W. 253, 15 N. C. C. A. 586; *Blaes v. Dolph*, 195 Mich. 137, 161 N. W. 885, 15 N. C. C. A. 587.

25. *McDonald v. Fidelity & Deposit Co. of Maryland*, 2 Mass. Wkm. C. C. 529, 11 N. C. C. A. 495; *Marinelli v. Contractors Mut. Liab. Ins. Co.*, 1 Mass. Wkm. C. C. 414, 11 N. C. C. A. 496; *In re Robert L. Hawkins*, 2nd A. R. U. S. C. C. 103.

26. *Plass v. Central N. Eng. R. R. Co.*, 169 N. Y. App. Div. 826, 155 N. Y. S. 854, 11 N. C. C. A. 498.

27. *Whalen v. U. S. Fidelity & Guarantee Co.*, 2 Mass. Wkm. C. C. 318, 11 N. C. C. A. 498; *Chiesa v. U. S. Crushed Stone Co.* 1 Bull. Ill. I. Bd. 82 11 N. C. C. A. 504.

28. *Thompson v. Ashington Coal Co.*, 3 B. W. C. C. 21, 11 N. C. C. A. 505.

29. *In Re Miller*, Ohio Ind. Com. No. 78789, Aug. 16, 1915, 11 N. C. C. A. 506.

poisoning resulted and developed into a retrocecal abscess, from which the patient died. The mother of deceased contended that the retrocecal abscess was caused by metastatic infection from the abscess in the hand, and that death was proximately caused by accident. There was no direct evidence of any accident having happened to deceased. That a sliver of steel from the cable entered his hand was a mere matter of conjecture upon which the court would not base an award.³⁰

Where disability was aggravated by conscientious, but improper, treatment given the injury by the injured employee herself, and infection resulted which would have been avoided had the employer promptly furnished medical services, the employer was liable for medical expenses consequent upon the aggravation.³¹

An employee worked kneeling while painting a deck, and bursitis and infection developed in his knee, and medical experts testified that the injury could only come from accident in such employment, then, although no accident can be definitely proved, the cause of injury was sufficiently connected with the employment as an accidental cause.³²

Where an employee received a cut on his hand, and later infection developed in his shoulder, the court held that the infection in the shoulder was traceable to the original injury to the hand, which might readily produce the chain of disorders which eventually resulted in death.³³

An employee suffered an injury consisting of a fracture to the femur. He was treated properly, but blebs followed, and these blebs became infected and ulcerated. After a lapse of three months a deep seated infection set in. Before the blebs and resulting ulcers disappeared, however, several months had intervened and the tissues of the lower leg had become weakened and the skin tender. The lapse in time militates against the theory that

30. *Olney v. West Side Lbr. Co.*, 2 Cal. Ind. Acc. Comm. 272, 11 N. C. C. A. 508; *Beckster v. Pattison*, 1 Conn. C. Dec. 61.

31. *Forgues v. Southern Pac. Co.*, 2 Cal. I. A. C. Dec. 1038.

32. *Porter v. Anderson*, 1 Cal. I. A. C. D. 608; *Johnson v. Sudden & Christenson*, 1 Cal. I. A. C. D. 422.

33. *Engstrom v. L. Candee & Co.*; 1 Conn. Comp. Dec. 691; *Foly v. A. T. Demarest and Co.*, 1 Conn. C. D. 661.

the deepseated infection resulted from the injury, while the weakening of the tissues above mentioned would tend to establish the existence of such relation. The deep seated infection was held to be due to the accidental injury, and compensable.³⁴

An infection of the hand and a secondary infection of the leg, resulting from an abrasion of the skin and the accidental introduction of a foreign substance, is an injury within the act.³⁵

Applicant was denied compensation for an amputated finger, which amputation was alleged to have been made necessary as the result of a burn, suffered while striking a match to light the gas for a body ironer, in the employer's laundry. The wound afterward became infected. The evidence was held sufficient to establish the fact that the injury to the finger was due to an accident, which occurred in the course of employment.³⁶

An employee suffered an injury to his foot, which produced such a physical condition that it was susceptible to infection from a slight injury, and thereafter, probably from chafing of his shoe, a break of the skin was caused, which resulted in blood poisoning and death. This was held to be a compensable injury.³⁷ But abrasions of the feet caused solely from the rubbing of ill fitting shoes are not compensable injuries,³⁸ unless the nature of the employment subjects the employee to unusual risks of injuries from shoes, as hiking.³⁹

Where a boy riding a bicycle was injured in his hip by a fall from the wheel and infection developed, causing long disability, it was held that the injury was due to traumatism and not to an infectious disease which the boy had suffered four years previously.⁴⁰

34. *Frank Melia v. The Race Brook Country Club & The Aetna Life Ins. Co.*, 1 Conn. C. Dec. 549.

35. *In Re claim of L. B. Green*, Op. Sol. Dep. C. & L., p. 199.

36. *Wells v. Metropolitan Laundry Co.*, 1 Cal. Ind. A. C. part 2, 66; *Netherland v. Contra Costa Const. Co.*, 1 Cal. I. A. C. part 2, 440.

37. *Maroney v. Gilbert Mfg. Co.*, Conn., Comp. Com. Third Dist., Beers, Com'r, Feb. 17, 1917 (Unreported).

38. *In re Wallace D. Westfall*, 2nd A. R. U. S. C. C. 91; *In re Chas. A. Chapman*, 2nd A. R. U. S. C. C. 92.

39. *In re Walter Enborn*, 2nd A. R. U. S. C. C. 243.

40. *Lannan v. Simpkins*, 3 Cal. I. A. C. 127.

Where an employee did not regain normal health but continued in a weak and debilitated condition after recovering from the direct effects of an accident, and died thirteen months thereafter from bronchitis following influenza, it was held that the bronchitis proved fatal because of the condition to which the accident had reduced the deceased, and that death resulted from the injury.⁴¹

Where a workman had returned to work after an operation, with orders not to strain himself, while working at the lever of a machine, and he was later discovered talking to a foreman, while blood was streaming from the wound, after which septic poisoning followed, resulting in the man's death, in the absence of direct evidence as to what had happened, the court drew the inference that the wound had burst open through the strain of working the lever, and awarded compensation.⁴²

An employee came in contact with a live electric wire, which caused him to fall from a ladder, seriously injuring him. Typhoid infection developed, and resulted in death. Medical testimony showed that deceased was very susceptible to infection, his system not being able to withstand an attack of that disease by reason of the fact that he had never recovered from the effects of the injury. Compensation was awarded.⁴³

Where the wounded wrist of an employee had practically healed when he engaged in a boxing match, which stirred the bacteria, causing the wrist to become infected, finally resulting in the loss of the bones of the hand and wrist, the court held that the infection was not due to the accidental injury.⁴⁴

An employee, engaged in shaving and painting poles, bruised the flesh and knocked a small piece of skin from his hand. He continued work for three or four days until he was unable to work because of blood poisoning, produced by germs entering the flesh through the break in the skin. It was impossible to ascertain the

41. *Thoburn v. Bedlington Coal Co.*, 5 B. W. C. C. 128; *Re L. F. Perron*, *Op. Sol. Dep. C. & L.*, pg. 579.

42. *Groves v. Burroughes & Watts*, 4 B. W. C. C. 185.

43. *Re J. B. Atkinson*, *Op. Sol. Dep. C. & L.* pg. 197.

44. *Kill v. Industrial Com. of Wis.*, 160 Wis. 549, 152 N. W. 148, L. R. A. 1916A, 14.

source of the germs or when they gained entrance to the wound. The time which elapsed between the abrasion and the beginning of blood poisoning was the usual period of infection for this disease. The court held that the disability was due to the injury.⁴⁵

Where infection formed in a laceration on the head of a subway worker, caused by the falling of a beam, compensation was allowed.⁴⁶

Compensation was allowed for death caused by tetanus, as the result of a wound in the foot by a rusty nail.⁴⁷

Compensation was denied, because of lack of evidence, for the death of claimant's husband, alleged to have been caused by blood poisoning, due to rupture of the mucous membrane inside of the nose, permitting the entrance of germs. The rupture having been caused by an accidental blow from a container.⁴⁸

A bookkeeper received a slight scratch, and three days later the pain became very great from the infection which set in. It was held that this was an accidental injury.⁴⁹

Compensation was denied in a claim for infection alleged to have resulted from an injury caused by a chapping of an employee's hands as a result of working with his hands in staining furniture with an analine dye solution. It was held to be an occupational disease, not an accidental injury.⁵⁰

Where an employee, while helping a fellow employee after working hours to install the plant of his employer, received a slight injury to his thumb, which developed into bloodpoisoning, finally resulting in death from acute, inflammatory rheumatism, the evidence was held to sustain a finding that death resulted

45. *Great W. Power Co. v. Pillsbury*, 171 Cal. 79, 151 Pac. 1136, L. R. A. 1916 A. 281, 11 N. C. C. A., 493.

46. *Pelctreck v. Degnon Cont. Co.* S. D. R. Vol. 6, pg. 394.

47. *Putnam v. Murray*, 174 App. Div. N. Y. 720, 160 N. Y. S. 811; *Marstus v. Employers Liab. Ass.*, 1 Cal. I. A. C. Part 2, 360.

48. *Partridge v. Norwich Pharmacial Co.*, S. D. R. Vol. 6, pg. 336.

49. *Jameson v. Bush*, 1 Cal. I. A. C. Part 2, 507; *Dreyer v. G. W. Power Co.*, 1 Cal. I. A. C. Part 2, 489.

50. *Jerner v. Imperial Furniture Co.*, 200 Mich. 265, 166 N. W. 943, 17 N. C. C. A. 345; *Boyd v. Travelers Ins. Co.*, 1 Mass. I. A. Bd. 180.

from an accidental injury received in the course of the employment.⁵¹

A workman in a city park sustained a scratch on the back of his hand, which became infected, and caused his death from blood-poisoning. Although there was no evidence to indicate in what manner he was injured there was evidence that the injury occurred while he was at work, and the superior court sustained an award in the widow's favor.⁵²

Where compensation was sought for the death of an employee due to infection of the kidneys, and it was shown that an accident had occurred which affected the kidneys, but all the medical evidence was to the effect that the infection could not have resulted from the accident but had its origin in the insertion of a pessary, which was unsanitary, it could not be said that death resulted from an accident.⁵³

§ 207. **Influenza.**—Influenza contracted as the result of a weakened vitality following an injury is compensable under the Pennsylvania Act.⁵⁴

Under the construction placed upon the word injury as used in the California Act, influenza, contracted by a hospital employee in the course of his employment, and not by any bodily injury through violence is compensable. The court said: "Two grounds are urged why the award is invalid. The first, and more important, is that the awarding of compensation for death by disease, the origin of which was not a bodily injury suffered through violence, is beyond the power of the commission.

"The decision on the first question presented turns on the meaning to be given to the word 'injury' as used in article 20, Section 21, of our Constitution. The section has been amended since Slattery's death, but at that time read:

51. *Perdew v. Nufer Cedar Co.*, 201 Mich. 520, 167 N. W. 868, 16 N. C. C. A. 921, 2 W. C. L. J. 313.

52. *In re Bean*, 227 Mass. 558, 116 N. E. 826.

53. *Kade v. Greenhut*, —, App. Div. —, 185 N. Y. S. 9, 7 W. C. L. J. 232.

54. *Dubluskey v. Phil. & Reading Coal & Iron Co.*—Pa.—, 1921, 112 Atl. 745.

'The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for an injury incurred by the said employees in the course of their employment, irrespective of the fault of either party.'

The word 'injury' as so used means, of course, only bodily injury, and the position of the city is that it means only bodily injury suffered by or resulting from violence, while the position of the commission is that it covers any harmful effect upon the body, whether by violence or by disease. The word is frequently used in both the broader and the more limited sense. In common usage, it has the more general meaning. Thus, Webster defines 'injury' as: (1) 'Any wrong, damage, or mischief done or suffered;' as (2) 'a source of harm;' or as (3) 'a wrong or damage done to another.' On the other hand, when personal injuries are spoken of, there are apt to be meant only bodily injuries suffered through violence in some form or to some extent, traumatic injuries. The exact meaning of the word 'injury' as used in Workmen's Compensation Acts, or in a similar connection, has come before the courts for consideration on numerous occasions, and their rulings are by no means harmonious. On the one hand, there are a number of cases holding that word has the more limited meaning. An example of this is *Linnane v. Aetna Brewing Co.*, 91 Conn., 158, 99 Atl. 507, L. R. A. 1917D, 77, where it was held that the phrase personal injury did not include injury or harm suffered by disease, and that compensation was not allowable for the death of an employee by pneumonia contracted as the result of unusual exposure and exhaustion in the course of his employment. Other examples along the same line are *Industrial Accident Com., etc., v. Brown*, 92 Ohio, 309, 110 N. E. 744, L. R. A. 1916B, 1277; *Adams v. Acme, etc., Co.*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283, Ann. Cas 1916D, 689; *Richardson v. Greenburg*, 188 App. Div. 248, 176 N. Y. Supp. 651; *Liondale, etc., Works v. Riker*, 85 N. J. Law, 426, 89 Atl. 929.

"On the other hand, there are large number of decisions which adopt the broader meaning, and hold that compensation is allowable for the injury or harm done by disease, although the disease

is not contracted as the result of any violence whatever in the ordinary sense of that word.

“Under the English Workmen’s Compensation Act, compensation is, or was allowable only for ‘personal injury by accident,’ a much more limited expression than that found in our constitutional provision, and one in which it might well be thought there was some implication of an injury by violent external means. Nevertheless, the House of Lords held, in *Brinton’s v. Turvey*, L. R. Ap. Cases (1905) 230, that compensation was allowable for the injury sustained by a workman from anthrax contracted by him in the handling of infected wool; there being no violence other than bacteria from the wool found their way into his system.

“Similarly, it as held in *Scott v. Pearson*, L. R. 2 K. B. Div. (1916) 61, that compensation was allowable for cattle ringworm contracted by an employee by coming in contact, not violent, with infected calves.

“Along the same line, the House of Lords held in *Glasgow Coal Co. v. Welsh*, L. R. 2 Ap. Cases (1916) 1, that a miner was entitled to compensation for rheumatism contracted by him as a result of his being required to stand for a number of hours in cold water to bale out the mine pit.

“The Indiana Workmen’s Compensation Act, like the English Act, allows compensation for ‘personal injury or death by accident.’ But in *United Paperboard Co. v. Lewis* (Ind. App.) 117 N. E. 276, Compensation was allowed to a workman for acute nephritis contracted by him through his being required to work for several hours in heated paper pulp. The following portion of the opinion is pertinent here.

“The courts have also differed as to whether a disease following an employment should be considered an injury by accident within the meaning of such acts. In the various decisions on this subject it is generally recognized that diseases are of two classes: First, the so-called industrial or occupational diseases, which are the natural and reasonably to be expected results of a workman following a certain occupation for a considerable period of time; second, diseases which are the result of some unusual condition of the employment. The first class is illustrated by lead poisoning and the second by pneumonia following an enforced exposure. As

a rule such industrial or occupational disease are not considered as injuries by accident and in the absence of special statutory provision compensation is not allowed therefor. On the other hand, it is generally accepted that a disease, which is not the ordinary results of an employee's work, reasonably to be anticipated as a result of pursuing the same, but contracted as a direct result of unusual circumstances connected therewith, is to be considered an injury by accident, and comes within the provisions of acts providing for compensation for personal injury so caused. citing a long list of authorities).'

"In *Hurle's Case*, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915 C, 919, a workman employed to tend furnaces for making gas claimed compensation for the loss of his sight due to an acute attack of optic neuritis induced by poisonous gases from the furnaces to which his work constantly exposed him. The Massachusetts act allowed compensation for 'personal injury' without requiring that it be by accident, and the question discussed by the court was as to whether the case was one of a 'personal injury.' The discussion concludes thus:

'The learned counsel for the insurer in his brief had made an exhaustive and ingenious analysis of the entire act touching the words 'injury' or 'injuries,' and has sought to demonstrate that it cannot apply to an injury such as that sustained in the case at bar. But the argument is not convincing. It might be decisive if 'accident' had been the statutory word. It is true that in interpreting a statute words should be construed in their ordinary sense. Injury, however, is usually employed as an inclusive word. The fact remains that the word 'injury,' and not 'accident,' was employed by the Legislature throughout this act. It would not be accurate, but lax, to treat the act as if it referred merely to accidents.'

"In *State v. Trustee*, 138 Wis. 133, 119 N. W. 806, 20 L. R. A. (N. S.) 1175, the widow and children of a policeman dying from pneumonia contracted by exposure in the course of his duty made application for a pension under a statute which provided for a pension to the dependents of a policeman "injured" in the performance of his duty. It was contended that

by injury was not meant disease merely, and upon this point the court said (138 Wis. 135, 119 N. W. 807, 20 L. R. A. (N. S.) 1175):

'The word 'injury, in ordinary modern usage, is one of very broad designation. In the strict sense of the law, especially the common law, its meaning corresponded with its etymology. It meant a wrongful invasion of legal rights, and was not concerned with the hurt or damage resulting from such invasion. It is thus used in the familiar law phrases *damnum absque injuria*. In common parlance, however, it is used broadly enough to cover both the *damnum* and the *injuria* of the common law, and indeed is more commonly used to express the idea belonging to the former word, namely the effect on the recipient in the way of hurt or damage, and we cannot doubt that at this day its common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by any one. Hence, unless some reason to the contrary is presented, it should be so understood in these statutes. Subdivision 1, Section 4971, Stats. (1898). The respondent contends that, nevertheless, the word should be limited to the results of external violence. By itself the word 'injury' or 'injure' has no more application to the result of violence than to the result of any other injurious influence. A disease resulting from negligence of a physician in failing to give treatment is just as much an injury in common phrase as if it resulted from affirmative maltreatment of external violence.'

"The following cases, in none of which was the element of violence present, are along the same line: *Alloa Coal Co. v. Drylie*, 6 B. W. C. C. 398 (death by pneumonia); *Hood v. Maryland etc., Co.* 206 Mass. 223, 92 N. E. 329, 30 L. R. A. (N. S.) 1192, 138 Am. St. Rep. 379 (contracting of glanders); *Dove v. Alpena, etc., Co.*, 198 Mich. 132, 164 N. W. 253 (death by anthrax); *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640, L. R. A. 1916 A. 273, Ann. Cas. 1918B, 293 (death by typhoid fever).

"Finally there is the decision in this state in *Hartford, etc., Co. v. Industrial Accident Commission*, 32 Cal. App. 481, 163 Pac. 225, where an employee engaged in handling pulverized grain, and who contracted an affection of the nose and throat from the grain, was allowed compensation. The sole point discussed in the opin-

ion, to be sure, is as to whether the disease was caused by the man's employment, but nevertheless it is a decision that cannot be justified unless the word 'injury' is broad enough to include the harm done by disease.

"As between these two conflicting lines of decision it is not necessary to determine where the weight of authority lies, or which cases are the better reasoned. If those which give the broader meaning to the word 'injury' do not lay down the better rule, they at least establish this, that it cannot be said that the broader meaning is an impossible or unreasonable one. The situation then, as it presents itself in connection with our constitutional provision, is at least that both by general usage and by the decisions of the courts the word 'injury' may have either of two meanings, and that either is reasonable and possible. In such a situation, where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling."⁵⁵

§ 208. **Inhalation of Noxious Gases.**—Deceased was employed as a watchman in the store yard and tool house of defendants plant. On the afternoon of the day of the accident he was found dead in the office. Gas was escaping from a disconnected supply pipe leading to the gas heater. It was concluded that deceased's death occurred from gas poisoning. In reversing an award the court said: that, conceding that the business of the employer was of a hazardous nature, and one within the New York Workman's Compensation Act, still the deceased was employed as a watchmen at the tool house and material storage plant where none of defendant's business was carried on, and was not in any way subject to the hazards of the business, and was not an employee

55. *City & County of San Francisco v. Indus. Comm.* — Cal. —, (1920), 191 Pac 26, 6 W. C. L. J. 428; *In re Victor Frey*, 3rd A. R. U. S. C. C. 125; *In re Enice Miller*, 3rd A. R. U. S. C. C. 149; *In re Patrick E. Burk*, 3rd. A. R. U. S. C. C. 140.

in a hazardous employment, within the contemplation of the Workmen's Compensation Act.⁵⁶

Where a laborer was ordered to do some painting, and, in following instructions, heated the paint in an enclosed room and became poisoned from the gases, given off in the process of heating, which caused his death, the court held that this was not an occupational disease, for that term must be restricted to a disease that is not only incident to an occupation, but the natural, usual, and ordinary result thereof; and held not to include one occasioned by accident or misadventure while heating the paint in a small, unventilated room, where the deadly fumes pervaded the atmosphere the employee was compelled to breathe.⁵⁷

Deceased was employed as a fireman at furnaces in a smelter for fifteen years, about six days before his death he became ill, and the medical testimony was to the effect that death was due to arsenical poisoning. The industrial board concluded that death was due to acute arsenical poisoning not of a chronic nature. The circuit court affirmed this award on the ground that death was due to an accident and not to an occupational disease.⁵⁸

Where a carpenter died as a result of the inhalation of poisonous fumes of chemicals while doing odd jobs about his employer's plant, compensation was denied because claimant failed to prove that death resulted from an injury arising out of the employment.⁵⁹

Where a miner entered a portion of a mine, against orders and despite danger marks, for the purpose of obtaining a machine

56. *Kehoe v. Consolidated Telegraph and Electrical Subway Co.*, 176 N. Y. App. Div. 84, 162 N. Y. Supp. 481, 16 N. C. C. A. 640; *John A. Roebling's Sons Co. v. Ind. A. C. of Cal.*, 36 App. Div. 10, 171 Pac. 987, 16 N. C. C. A. 891.

57. *Ind. Com. of Ohio v. Roth et al.*, 98 Ohio St. 34 120 N. E. 172, 17 N. C. C. A. 342, 2 W. C. L. J. 829; *Holnagle v. Lansing Fuel & Gas Co.* — Mich. —, 166 N. W. 843, 1 W. C. L. J. 1010.

58. *Mattheissen and Hegeler Zinc Co. v. Ind. Board of Ill.*, 284 Ill. 378, 120 N. E. 249, 17 N. C. C. A. 788, 2 W. C. L. J. 876; *Bishop v. City of Chicago*, 1 Ill. Ind. Bd. 96, 10 N. C. C. A. 274.

59. *In Re Murphy*, 230 Mass. 99, 119 N. E. 657, 17 N. C. C. A. 249; *Bennett v. Barnardino Laundry Co.*, 3 Cal. I. A. C. 229; *In re Wm. C. Schaeffer*, 3rd A. R. U. S. C. C. 124.

previously left there, and met death from inhaling noxious gases, the court held that deceased's death was due to an accident arising out of his employment, and his disobedience in this case was mere negligence and not sufficient to bar compensation.⁶⁰

An electrician, while engaged in stringing wires in an ash cellar under defendant's boiler room, became ill from coal gas, and died three months later of pulmonary tuberculosis. Upon evidence tending to establish that the coal gas was the primary cause of the death, compensation was awarded.⁶¹

An employee, working about furnaces for producing gas, was required, in the performance of his duties, to look into holes in the cover of the furnace about seventy times per day, and the inhalation of gases which escaped from these holes caused an acute attack of optic neuritis, resulting in his becoming totally blind. It was held that his blindness was a personal injury, and compensable under the Massachusetts Workmen's Compensation Act.⁶²

Where a stevedore, in attempting to rescue an unconscious man from the hold of a ship, was overcome by inhaling carbonic acid gas and died, the court held that the deceased's death was due to an accident arising out of his employment.⁶³

Compensation was awarded for the death of a miner, whose death resulted from the inhalation of poisonous gases while working in the mines.⁶⁴

Death from lobar pneumonia, following inhalation of smoke, and a wetting received by a member of a fire brigade while fighting fire to protect his employer's property, was caused by an injury arising out of the employment.⁶⁵

60. *Gurski v. Susquehanna Coal Co.*, 262 Pa. 1, 104 Atl. 801, 17 N. C. C. A. 943.

61. *Odell v. Adirondack Elec. Power Co.*, 223 N. Y. 686, 119 N. E. 1063, 17 N. C. C. A. 877.

62. *In Re Hurle*, 104 N. E. 336, 217 Mass. 223, 4 N. C. C. A. 527, L. R. A. 1916A. 279, Ann. C. 1915C, 919.

63. *London & E. Shipping Co. v. Brown*, 10 N. C. C. A. 483, 7 F. 488, 42 S. C. L. R. 357.

64. *Giacobbia v. Kerns Donnewald Coal Co.*, Bull. No. 1, Ill. Pg. 196.

65. *In re McPhee*, 222 Mass. 1, 109 N. E. 633; *Kelley v. Auchenlea Coal Co.*, 48 Scotch L. R. 768, 4 B. W. C. C. 417.

Involuntary inhalation of gas has been held to be an accidental injury within the meaning of a policy insuring an individual against accidental injury.⁶⁶

An employee developed a case of acute bronchitis and lead poisoning as a result of the inhalation of gas fumes from an oxyacetylene-burning machine, and it was held that the incapacity was due to an injury.⁶⁷

Claimant was engaged in sealing the inner plating of a caisson. Particles of red lead being sealed became embedded in sore spots on his face or were inhaled into the system, causing incapacity. This was held to be an injury.⁶⁸

Injury to an employee from inhaling poisonous gases and fumes, which defendant had failed to remove by ventilators, fans, etc. was held to be an accidental injury by the common-law court, but recovery was denied because the decision of the commission, finding that there was no accident, was *res adjudicata* in a common-law action for damages.⁶⁹

A plumber, in searching for a gas leak, lit a match, and an explosion followed. After the fire was extinguished he continued his search for the leak by the sense of smell, when he suddenly toppled over and died. The death was due to a combination of asphyxiation and excitement, and was held to be an injury arising out of the employment.⁷⁰

Where a blacksmith inhaled gas fumes from a forge, and the sickness that followed was a gradual development covering a period of several years, it was held that this was not such an injury as entitled the workman to compensation.⁷¹

66. *Paul v. Travelers Ins. Co.*, 112 N. Y. 472, 20 N. E. 347; *Pickett v. Pac. Mut. Life Ins. Co.*, 144 Pa. St. 79, 22 Atl. 871; *Pollock v. United States Ins. Co.*, 102 Pa. St. 230; *United States, etc. Assoc. v. Newmans*, 84 Va. 52; *Sinclair v. Maritime Passengers Ins. Co.*, 3 Ellis and Ellis 476.

67. In Re claim of C. M. Arata, Op. Sol. Dep. (1915), 264.

68. In Re claim of Randolph A. Thayer, Op. Sol. (1915) 266.

69. *Naud v. King Sewing Mach. Co.*, 95 Misc. Rep. 676, 159 N. Y. Supp. 910.

70. *Coady v. Igo*, 1 Conn. C. D. 576, 91 Conn. 54, 98 Atl. 328.

71. *Hagden v. The Comm. Co.*, Conn. Com'r, Third Dist., June 16, 1916. (Unreported).

See Asphyxiation, also Eye Injuries.

While a railroad employee was riding on top of a car in passing through a tunnel he became dizzy from inhaling smoke and gases. As result of the dizziness he fell from the car and was run over by other cars. This was held to be a compensable accidental injury.⁷²

A gas fitter died from paralysis, due to cerebral hemorrhage, a few days after he had inhaled coal gas, but the evidence showed that seven months previous to his death he had suffered from an attack of paralysis. The county court Judge decided that the death was not due to gas poisoning. This was a decision of a question of fact within the power and duty of the county judge.⁷³

Cardiac hypertrophy, resulting from the inhalation of fumes of ether in a mixing house at the naval proving ground, caused the death of an employee. This was held to be a compensable injury.⁷⁴

Enteritis, contracted from inhaling sewer gas in the course of employment, accelerated long-standing heart disease, which incapacitated the man from work sooner than the heart disease would have incapacitated him. This was held not to be a personal injury by accident.⁷⁵

Where death resulted from breathing carbon monoxide gas in a beer tank where charcoal had been burned to dry the tank, the death was held to have been due to an accident.⁷⁶

Compensation for disability from bronchitis alleged to have been caused by the inhalation of poisonous fumes from a forge was disallowed on a conflict of medical testimony.⁷⁷

72. *Caccavano v. N. Y. Q. & W. Ry. Co.*, 6 N. Y. St. Dept. Rep. 380, 12 N. C. C. A. 471.

73. *Dean v. London & N. W. Ry. Co.*, 3 B. W. C. C. 351, C. A.

74. *Re Basil E. Clark*, Op. Sol. Dep. L., page 270.

75. *Broderick v. London County Council*, 1 B. W. C. C. 219; *Eke v. Sir William Hart Dyke*, 3 B. W. C. C. 482.

76. *Market v. National Brg. Co.*, 2 Cal. I. A. C. 876; *Burgess v. Geo. Star and Empire Mines and Investment Co.*, 2 Cal. I. A. C. 88.

77. *In re Willehad K. Seward*, 2nd A. R. U. S. C. C. 153.

§ 209. **Ink Poisoning.**—Disability caused by ink poisoning to the hands of an employee required to work with the solution is a compensable injury under the Federal Act.⁷⁸

§ 210. **Insanity.**—In October a workman suffered an injury to his thumb, which, due to infection, was slow in healing. He could not work. After Christmas he became very depressed, and began to suffer from neurasthenia and in a few days threw himself under a train and was killed. The court, in denying compensation, said: "I think if we were to assent to the very able and interesting arguments which we have heard we should be driven to say that, wherever we find an accident which involves, as so many accidents do, depression of spirits, particularly in the case of a man who had been leading an active life as a laboring man or artisan, depression at being kept from his work and idling about at home, then if neurasthenia and suicide result, they can all be traced directly to the accident. If we were to say that, we should be opening a very wide door; and I think we ought not to do so. I think, as the Scottish court said, there must be some direct evidence of the insanity being a result of the accident—something more than the insanity being subsequent in turn to the accident. The legal causation must be established and proved."⁷⁹

Subsequent insanity of an employee does not deprive him of compensation due him under the act.⁸⁰

Where an employee became insane after an accident, but due to a constitutional disease, rather than the accident, compensation was denied.⁸¹

Where an injured employee became insane after an operation for hernia, but it was shown that the patient had a hereditary predisposition to insanity, compensation was denied.⁸²

78. In re Wm. S. Crews, 2nd A. R. U. S. C. C. 166.

79. Withers v. London B. & S. Co. Ry., (1916) W. C. & Ins. Rep. 317, 15 N. C. C. A. 349.

80. In re Walsh, 227 Mass. 341, 116 N. E. 496, 15 N. C. C. A. 345.

81. Hansen v. Patterson Ranch Co., 2 Cal. Ind. Acc. Com. 769.

82. Kato v. Godin, 3 Cal. Ind. Acc. Comm. 333; Simon v. H. J. Cathroe, 162 N. W. 633, 101 Neb. 211.

Insanity proximately caused by an accidental injury is a proper basis for compensation.⁸³

Where an accidental injury, resulting in total blindness, produced a condition of the mind upon which softening of the brain supervened, causing death, it was held that the death resulted from the injury.⁸⁴

Where a pre-existing constitutional disease, known as syphilis, was aggravated, by an injury due to an accident, until general paralysis or insanity resulted, depriving the employee of all capacity for work in the future compensation was allowed. The court said: "The statute prescribes no standard of fitness to which the employee must conform and compensation is not based on any implied warranty of perfect health, or immunity from latent and unknown tendencies to disease, which may develop into positive ailments, if incited to activity through any cause originating in the performance of the work for which he is hired. What the legislature might have said is one thing, what it has said is quite another thing, and in the application of the statute the cause of partial or total incapacity may spring from, and be attributable to the injury just as much where undeveloped and dangerous physical conditions are set in motion producing such result, as where it follows directly from dislocations; or dismemberments; or from internal organic changes capable of being exactly located."⁸⁵

In the absence of a showing that insanity resulted from an accidental scalp wound, compensation was denied.⁸⁶

An employee received an injury to his hand and bloodpoison developed, resulting in insanity. While insane the employee com-

83. *T. F. Hayes v. Standard Oil Co.*, 1 Cal. Ind. Acc. Com. 218, 14 N. C. C. A. 771; *In re Arthur W. Shultz*, 2nd A. R. U. S. C. C. 70.

84. *Mitchell v. Grant & Aldcroft*, 7 W. C. C. 113.

85. *In re Crowley*, 223 Mass. 288, 111 N. E. 786, 15 N. C. C. A. 345.

86. *Brownlee v. Coltness Iron Co., Ltd.* (1917), W. C. & Ins. Rep. 235, (1917), 1 Sc. L. T. 185 15 N. C. C. A. 347; *Slater v. Blyth Shipbuilding & Dry Docks Co.*, (1914) W. C. & Ins. Rep. 38, 7 B. W. C. C. 193, 11 N. C. C. A. 800; *In re Ebner*, Ohio Ind. Com. Dec. No. 1320, May 12, 1913, 10 N. C. C. A. 1045.

mitted suicide. The court held that the death resulted from the accident.⁸⁷

Where an employee is present at the scene of death by accident of several employees, and becomes insane while attempting to rescue his fellow employees, such insanity is a disability proximately caused by accident, and compensable.⁸⁸

An employee received an injury through a splash of molten lead in his eye. Later a condition of insanity developed, and while in this state he threw himself from a window of the hospital and was killed. The court held that there was sufficient evidence to establish the fact that the death was due to the original accident.⁸⁹

Where an employee suffered total blindness from an injury to his eyes, and later committed suicide the court held that evidence to show the connection between the suicide and insanity alleged to have resulted from the accident, should have been admitted.⁹⁰

Insanity is not to be inferred merely from the fact that a workman who had received an injury to his eye, and was suffering great pain, committed suicide, although there was no other reason advanced for the act except the injury.⁹¹

A motorman was operating an elevated train which collided with another train, as the result of which the motorman received a shock that caused insanity. Compensation was awarded.⁹²

A blistered hand became infected and required two operations. The employee was driven insane through suffering and nervous conditions, and it was held that the connection between the per-

87. *Chisea v. United States Crushed Stone Co.*, Ill. I. Bd. No. 629, Oct. 28, 1914, 11 N. C. C. A. 504.

88. *Reich v. City of Imperial*, 1 Cal. I. A. C. Dec. (1914) 337, 10 N. C. C. A. 479.

89. *In Re Sponatski*, *In Re Standard Acid Ins. Co.*, 220 Mass. 526, 108 N. E. 466, 8 N. C. C. A. 1025, L. R. A. 1916A, 333.

90. *Malone v. Cayzer, Irwine & Co.*, 1 B. W. C. C. 27, (1908), S. C. 479; 45 Sc. L. R. 351, 8 N. C. C. A. 1026; *Southall v. Cheshire Co. News Co.*, 5 B. W. C. C. 251 (1912), 8 N. C. C. A. 1028, L. R. A. 1916A, note 339.

91. *Grime v. Fletcher*, 8 B. W. C. C. 69; *Furnivale v. Johnson*, 5 B. W. C. C. 43,

92. *McMahon v. Interborough Rapid Transit Co.*, 5 N. Y. State Rep., 371.

sonal injury and the insanity being unbroken, this was a personal injury arising out of the employment.⁹³

Insanity resulting from the use of drugs is not a compensable injury.⁹⁴

§ 211. **Insect Bite.**—Where the claimant, while working received an insect bite which became infected from handling of meal, it was held that he received an accidental injury for which compensation would be allowed.⁹⁵

Where a dependent claimed that the death of deceased was due to infection caused by an insect bite received while cleaning the cellar of his employer's building, but the hospital records showed that death was due to chronic cardiac valvular disease, the Industrial Accident Board found that the death was not due to the accident, and dismissed the claim.⁹⁶

§ 212. **Ivy Poisoning.**—Where it was found that ivy and septic poisoning were the remote cause of an employee's death, and that his poisoned condition predisposed him to acute congestion of the lungs, from which he died and the ivy poisoning was contracted while mowing grass along a railroad track, the court held that death resulted from a compensable accident.⁹⁷

§ 213. **Lead Poisoning.**—A workman who gradually contracted lead poisoning from working in a room where there was molten lead and fumes arising therefrom, was held not entitled to an award of compensation under the Connecticut act, as the disease was occupational, and not compensable under the act.⁹⁸

93. *Whalen v. U. S. Fidelity & Guaranty Co.*, 2 Mass. I. A. Bd. 318, 11 N. C. C. A. 498.

94. *In Re Geo. H. Himes*, 2nd A. R. U. S. C. C. 122.

95. *In Re Dave*, 11 N. C. C. A. 497, Ohio Ind. Comm. No. 110808.

96. *Campbell v. Aetna Life Ins. Co.*, 2 Mass. Workm. C. C. 701, 11 N. C. C. A. 507.

97. *Plass v. Central New England R. Co.*, 169 N. Y. App. Div. 826, 155 N. Y. Sup. 854, 14 N. C. C. A. 141.

98. *Miller v. American Steel & Wire Co.*, 90 Conn. 349, 97 Atl. 345, 14 N. C. C. A. 842.

The claimant contracted lead poisoning in the course of his employment while working in a white lead plant, and became sick and disabled by reason thereof. The court held that this was an occupational disease and not a compensable injury under the Ohio Act.⁹⁹

An employee contracted lead poisoning while using magic paint remover, a mixture of denatured alcohol, ammonia and lead. The committee found that the employee suffered an accidental injury, but did not make findings of specific facts or state any conclusion drawn from the evidence in support of the general findings. For this reason the higher court reversed the decree and remitted it for further proceedings.¹

Claimant was employed in handling type, and was suffering from lead poisoning. There was no evidence tending to show the source from which the poison was received. The court held that there were no facts to show that claimant suffered a compensable injury.²

A lead grinder, who had been engaged in the same employment for 20 years, and who became incapacitated as a result of lead poisoning, was held to have suffered a personal injury under the Massachusetts Act.³

Where an employee worked 38 years in a zinc reducing plant, and there was no evidence in the record showing lead poisoning, and the employee was suddenly stricken with lead poisoning, it was held that the disease was traceable to a definite time, place and cause, and was therefore an accident, and not an occupational disease within the meaning of the Workman Compensation Act.⁴

An employee, working in a red lead plant, contracted lead poisoning and died. His duties as sifter or bolter tender brought

99. *Industrial Comm. of Ohio v. Brown*, 92 Ohio St. 309; 110 N. E. 744; 14 N. C. C. A. 843.

1. *In Re Mathewson*, 227 Mass. 470, 116 N. E. 831, 14 N. C. C. A. 846.

2. *In Re Doherty*, 222 Mass. 98, 109 N. E. 887, 14 N. C. C. A. 847; *In Re Peter Sweeney*, 2nd A. R. U. S. C. C. 163.

3. *Johnson v. London Guar. & Acc. Co., Ltd.*, 4 N. C. C. A. 843, 104 N. E. 735, 217 Mass. 388; *Walker v. Gage*, 223 Mass. 179, 111 N. E. 353; *Odonnell's Case*, — Mass. —, (1921), 125 N. E. 353.

4. *Matthiessen-Hegeler Zinc Co. v. Industrial Board*, 284 Ill. 378, 120 N. E. 249, 2 W. C. L. J. 876.

him in contact with the lead. The court reversed the award of the Industrial Accident Board saying, that lead poisoning is an occupational disease and not an injury for which compensation can be had under the Michigan Act.⁵

Where lead poisoning contracted by a workman was the cumulative effect of inhalation of enamel powder extending over a considerable time, and could not be traced to any definite time, it was held not to be an accidental injury.⁶

Where an employee contracted acute bronchitis and lead poisoning as a result of inhalation of gas fumes from an oxyacetylene burning machine, it was held that the incapacity was due to an injury.⁷

Lead poisoning is not an accident.⁸

Nor is an attack of colic brought on by lead poisoning.⁹

Lead poisoning contracted while at work in the usual course of the employment is a compensable injury under the Federal Act.¹⁰

§ 214. **Lightning.**—Where an employee of a bridge contractor is, with other employees, lodged and boarded on the ground where the work is done, and after the day's work is done is in the boarding tent, waiting until it is time to go to bed, and while thus engaged is killed by lightning, this is held not to be an accident arising out of his employment. The court said: "The words 'out of' involve the idea that the accident is in some sense due to the employment. *Barnabus v. Colliery Co.*, 103 L. T. R. 543; *Fitzgerald v. Clarke*, 2 K. B. 796. It is said in *Hopkins v. Sugar Co.*, 184 Mich. 87, 150 N. W. 325 L. R. A. 1916 A. 310: 'An employee may suffer an accident while engaged at his work, or in the course of his employment which in no sense is attributable to the nature of or risks involved in such employment, and therefore cannot be

5. *Adams v. Acme White Lead & Color Works*, 148 N. W. 485, 6 N. C. C. A. 482, 182 Mich. 157, L. R. A. 1916A, 283.

6. *Derkinderen v. Rundell Mfg. Co.*, Rep. Wis. Ind. Com. 1914-15, p. 16.

7. *In Re Claim C. Marata*, Op. Sol. 1915—264; *In Re Claim Willard E. Jule*, Op. Sol. 1915—261. See *Inhalation of Noxious Gases*.

8. *Steel v. Cammel Laird & Co.*, (1905) 7 W. C. C. 9.

9. *Williams v. Duncan*, (1898) 1 W. C. C. 123.

10. *In Re Geo. Prescott*, 2nd A. R. U. S. C. C. 166.

said to arise out of it. In *re McNicol*, 215 Mass. 497, 4 N. C. C. A. 522, 102 N. E. 697, L. R. A. 1916, A. 306, wherein recovery for injury by lightning is denied, it is done because no causal relation or peculiar exposure appears, and it is said that while the injury need not have been foreseen or expected, yet 'after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.' " 11

It has been held in a number of cases that injury and death due to lightning stroke under ordinary conditions was not an accident arising out of the employment.¹²

In a Montana case, where the employee was killed by lightning while operating a metal road grader, it was held that the grader did not have enough influence on lightning to increase the deceased's natural hazard.¹³

Quoting further from *Griffith v. Cole*, *supra*: "It is not intended to hold that injuries from lightning can in no case be due to an industrial employment. It has been rightly said that it can be. (But see *State v. District Court of Ramsey Co.*, 129 Minn. 502, 153 N. W. 119 which apparently recognizes this principle as being sound but does not follow it) * * * And so in *Roger v. School Board*, 1 Scots Law Times 271 wherein it is said that, 'To be struck by lightning is a risk known to all and independent of employment, yet the circumstances of a particular employment might make the risk not a general risk, but a risk sufficiently exceptional to justify its being held that the accident from such risk was an accident arising out of the employment. And it has been rightly held that injury from lightning did arise out of the employment where a telephone or telegraph operator was hurt by an electric shock received in the course of his work. *Atlantic Ry. Co. v. Newton*, 118 Va. 222, 12 N.

11. *Griffith v. Cole Bros.*, 183 Ia. 415, 165 N. W. 577, 15 N. C. C. A. 674.

12. *Klawnske v. Lake Shore & M. S. Ry. Co.*, 185 Mich. 643, 152 N. W. 213; *Hoenig v. Indus. Comm. of Wis.*, 153 Wis. 646, 150 N. W. 996; 8 N. C. C. A. 192, L. R. A. 1916 A. 339.

13. *Wiggins v. Indus. Acc. Bd.* 54 Mont. 335, 170 Pac. 9, 1 W. C. L. J. 643, 15 N. C. C. A. 696; *Kelly v. County Council*, 1 B. W. C. C. 194; *Andrew v. Society 2 K. B.* 32; *Falconer v. Building Co.*, 3 Ct. of Sess. Cas. (5th Series) 564.

C. C. A., 328, 87 S. E. 618. And so where a workman on a high scaffolding was kept at work during a storm. *Andrew v. Industrial Society*, 2 K. B. 32. But where the servant is riding a corn cultivator and plowing corn, being struck by lightning is suffering from what is not peculiarly invited by the employment. "

A driver of an ice company was required to follow a fixed route in substantial disregard of weather conditions. He was permitted to seek shelter in times of necessity. During a severe rain storm accompanied by lightning he was struck by lightning while under a tree. He either went there to seek shelter or was on his way to solicit orders. The court held that he suffered a compensable injury, within the meaning of the act.¹⁴

Where an employee was standing on a steel bolt, connected with a steel carrier track running through a barn, when a bolt of lightning struck the carrier track and traveled through the bolt and through the employee's foot, causing his death, it was held that the employment did not expose him to more than ordinary risk of lightning, and that the injury was not compensable.¹⁵

§ 215. **Lumbago.**—Lumbago resulting from an injury received in the employment is compensable under the Federal Act, but compensation was denied because of insufficient evidence.¹⁶

§ 216. **Malarial Fever.**—Malarial fever caused by exposure to the sun, and heat of a forest fire, and to overexertion was held to be a compensable injury.¹⁷

§ 217. **Meningitis.**—Meningitis caused by an injury to the spine is compensable under the Federal Act.¹⁸

Where compensation was claimed for the death of an employee caused by meningitis alleged to be due to an injury and abscess of

14. *State ex rel. Peoples Coal & Ice Co. v. Dist. Court of Ramsey Co.*, 153 N. W. 119, 9 N. C. C. A. 129, 129 Minn. 502.

15. *Cornwall v. Brock*, 2 Conn. Work. Comp. Com. 581.

16. *In re Eugene E. Pratt*, 2nd A. R. U. S. C. C. 120; *In re Walter A. Reiss*, 2nd A. R. U. S. C. C. 120.

17. *In re Archie A. Arbuckle*, 3rd A. R. U. S. C. C. 127.

18. *In re Thomas Brogan*, 3rd A. R. U. S. C. C. 118.

the ear, it was held upon conflicting medical testimony that claimant had failed to show any causal connection between the injury and the cause of the death.¹⁹

§ 218. **Mental Shock or Fright and Nervous Trouble.**—A nervous shock sustained by a workman due to excitement and alarm, resulting from a fatal accident to a fellow employee, was held to be an accidental injury, for which compensation would be allowed.²⁰

Where an employee, while aiding in the rescue of several co-employees, who were killed, became insane, due to the mental and emotional shock caused by the accident, it was held that insanity was a disability caused by accident.²¹

Where an employee, working on a scaffold, fell, injuring himself, from which he became subject to nervousness, the court held that the nervousness was the result of an accidental injury, and compensable.²²

Where an employee suffered dizziness and nervousness from an injury which incapacitated her from work, the court found that she was entitled to compensation for the incapacity due to the nervousness and dizziness.²³

Where an employee suffered a nervous shock from being entirely buried, when the bank of a trench in which he was working caved in, it was held that the incapacity caused by the nervous condition was a compensable injury.²⁴

Where an employee had completely recovered from an injury, caused by his arm being caught in a cog wheel, but was still

19. In re James A. Hardy, 2nd A. R. U. S. C. C. 117; In re. Chas E. Barry, 2nd A. R. U. S. C. C. 170.

20. Yates v. South Kirby Featherstone and Hemsworth Collieries Ltd., 2 K. B. 538; 3 N. C. C. A. 225; 3 B. W. C. C. 418; In re John W. Lyons, 2nd A. R. U. S. C. C. 106.

21. Industrial Accident Comm. in Reich v. City of Imperial, 1 Cal. Ind. Acc. Com. 337, 10 N. C. C. A. 479.

22. Coslett v. Shoemaker, 38 N. J. L. J. 116, 10 N. C. C. A. 1046.

23. Lata v. Am. Mut. Liability Ins. Co., 1 Mass. W. C. C. 283, 10 N. C. C. A. 1046.

24. Paolo v. Frankfort General Ins. Co., 1 Mass. Wkm. Com. Cas. 31, 10 N. C. C. A. 1047.

suffering from hysterical paralysis and nervous spasm, the court, in a proceeding to discontinue compensation, found that the employee was entitled to compensation for the nervousness as long as it should last.²⁵

Where the claimant asked additional compensation for nervous exhaustion, and it was found that the condition was due more to lack of occupation and his habit of dwelling upon himself to the point of exaggeration, than to the injury, the court held that compensation would not be allowed for longer than the period of incapacity.²⁶

Fright, without actual physical injury, is not sufficient to sustain an award of compensation under the Michigan Act.²⁷

§ 219. **Mitral Regurgitation.**—Deceased was found at the bottom of a platform on which he had been doing moderately heavy work. A thud was heard, and bruises about the body indicated a fall. Thirty minutes afterwards the doctor pronounced him dead of heart failure. The coroner found mitral regurgitation. The court, in reversing the commission, said that “there was nothing unusual or fortuitous about the work. It cannot be assumed that the man made a misstep, and then again assumed that such misstep caused fright and then again assumed that the fright caused the heart to stop. This would be not only basing an assumption upon an assumption, but would be taking one into the realm of conjecture.”²⁸

§ 220. **Myocarditis.**—Deceased, while doing heavy lifting, suffered a hernia. After an operation he made a fair recovery, was about for a time, but remained in a weakened condition, and

25. *Ream v. Sutter Butte Canal Co.*, 2 Cal. I. A. C. 168; 10 N. C. C. A. 1048; *Finley v. San Francisco Stevedoring Co.*, 2 Cal. I. A. C. 174, 10 N. C. C. A. 1048.

26. *Ford v. Travellers Ins. Co.*, 1 Mass. Wkm. Com. Cas. 332, 10 N. C. C. A. 1051.

27. *Visser v. Michigan Cabinet Co.*, Mich. Ind. Acc. Bd. Bul. No. 3 p 24 In re *Edith Woodward*, 3rd A. R. U. S. C. C. 129.

28. *Guthrie v. Detroit Shipbuilding Co.*, 200 Mich. 355, 167 N. W. 37, 1 W. C. L. J. 1035, 17 N. C. C. A. 867.

died in six weeks of myocarditis arteriosclerosis, which existed at the time of the operation and prior thereto. It could not be said that the operation hastened the death from this cause or caused it, and compensation was denied.²⁹

§ 221. **Myositis.**—Myositis resulting from an accidental injury is compensable under the Federal Act.³⁰

§ 222. **Nephritis.**—A cellar boy was compelled in the performance of his duties to flush out hot pulp from the floor of the basement, by means of water coming through a hose from the exhaust of the engine. On his way home at noon he became chilled after having become wet and overheated at his work. He developed nephritis which incapacitated him from work for considerable time. The court held that the illness of the claimant was due to an accident arising out of and in the course of his employment.³¹

A carpenter received a blow on the back in the course of his employment and later acute nephritis developed, which lowered his vitality and power of resistance until pulmonary tuberculosis became active, causing death. The court held that "the accidental injury suffered by the employee aroused the latent germs of the disease to which he was predisposed, materially accelerated the disease and caused his death earlier than it would otherwise have occurred."³²

Where an employe, having lost control of a bogey, which he was using to come down the employer's line of railway, jumped, and sustained injuries, which aggravated a previous condition of nephritis, and as a result of such aggravation death resulted sooner than it otherwise would, the court held that the applicant did not have to prove that death would not have resulted from this pre-existing disease but for the accident. It was sufficient if the ap-

29. *Tucillo v. Ward Baking Co.*, 180 App. Div. 302 167 N. Y. Supp. 666 (1917), 15 N. C. C. A. 637.

30. *In re James Wood*, 2nd A. R. U. S. C. C. 122.

31. *United Paperboard Co. v. Lewis*, 64 Ind. App. —, 117 N. E. 276, 16 N. C. C. A. 887.

32. *Retmier v. Cruse*, (Ind. App.), 119 N. E. 32, 17 N. C. C. A. 870, 1 W. C. L. J. 971.

plicant showed that death occurred sooner than it would have been brought about by the disease, if the disease had not been accelerated by the accident.³³

An employe was struck by a boom at the end of a trolley pole when a trolley wire broke. The blow, together with a shock of electricity from the wire, brought on a condition of acute nephritis and total blindness. This was held to be a compensable injury.³⁴

The Commissioner held that the claimant succeeded in establishing the causal connection between the injury received in the course of his employment and his disability, immediately caused by nephritis; where two physicians who had known him previous to the accident, and one who had not known him until subsequent to the accident, testified that his disability resulted from the injuries, while another physician testified that the disability was due to old age and disease.³⁵

Where an employee was exposed to severe cold after falling from a trestle, and later Bright disease or nephritis developed, the commission held that the disease was due to the accidental injury and exposure, and compensation was allowed.³⁶

An employee sought compensation for disability resulting from nephritis, alleged to have been brought on through the inhalation of sulphuric acid fumes. Medicial testimony showed that disability might result from the inhalation of sulphuric acid fumes, but that nephritis did not result from such cause. Compensation was denied.³⁷

An overheated employee was exposed to a damp, cold draft while in an overheated condition, and was stricken with severe pains in the elbows and between the shoulder blades, resulting in inability to use his hands, elbows, shoulder and legs. The injury was diagnosed as multiple neuritis, and was held to be a compensable injury.³⁸

33. *Golder v. Caledonian Ry.*, 5 F. 123, 400 Sc. L. R. 89, 10 N. C. C.A. 764; *In re Hickman* (Dec. 1913) Op. Sol. Dept. of L. P. 751.

34. *Cooper v. Mass. Employees Insur. Ass'n.*, 2 Mass. W. C. C. 573.

35. *Cody v. Beach*, 1 Conn. Comp. Dec. 447.

36. *Gale v. Petroleum Development Co.*, (1916), 3 Cal. I. A. C. 363; *In re Elton W. Riley*, 3rd A. R. U. S. C. C. 128.

37. *Costain v. Carson Chemical Co.*, (1916), 3 Cal. I. A. C. 334.

38. *Re Charles J. Withy*, Op. Sol. Dep. L., p. 273.

Because of insufficient evidence to show any casual connection compensation was denied where death resulted from nephritis alleged to be due to a blow on the testicles.³⁹

§ 223. **Occupational Diseases.**—" 'Occupation' has been defined by the courts of this (Ohio) and other states to be 'that particular business, profession, trade, or calling, which engages the time and efforts of an individual.' In other words, the employment in which one regularly engages, or the vocation of one's life. A disease contracted in the usual and ordinary course of events, which from the common experience of humanity is known to be incidental to a particular employment, is an occupational disease, and not within the contemplation of the workmen's compensation law." So where an employee was required to heat paint in an enclosed room, and through the inhalation of poisonous gases arising from the heated paint, death resulted, the court held that the accidental and unforeseen inhaling by an employee, in the course of his employment, of a specific volatile poison or gas, resulting in injury or death, is not an occupational disease.⁴⁰

An employee engaged in staining mahogany suffered from chapped hands, resulting in infection. The court held that the injury occurred by reason of the character of the employment and the act makes no provision for compensation to those suffering from occupational diseases.⁴¹

39. *In re John H. Cutler*, 3rd A. R. U. S. C. C. 128; *In re E. E. Hosking*, 2nd A. R. U. S. C. C. 170.

40. *Industrial Com. of Ohio v. Roth, et al.*, 98 Ohio St. 34, 12 N. E. 172 17 N. C. C. A. 342. 2 W. C. L. J. 829; *Industrial Commission of Ohio v. Brown—Ohio*—110 N. E. 744. The Ohio Constitution has been amended to authorize Compensation for occupational diseases. Since the decisions, mentioned in this section changes have been made in the laws of some of the states. Occupational diseases are now specifically included by the Calif. Conn. Porto Rico, Hawaii and Ohio (1921) Acts. N. Dak. by decision of Bureau. Mass. by interpretation. Excluded specifically by following Acts; Ala., Del., Idaho, Ind., Ia., Ky., Mo., Mont., Neb., S. Dak., Tenn., Utah, Md. and Minn. Oregon excluded by implication. Michigan, Utah and Texas excluded by interpretation.

41. *Jerner v. Imperial Furniture Co.*, 200 Mich. 265, 166 N. W. 943, 17 N. C. C. A. 344, 1 W. C. L. J. 1066; *McCauley v. Imperial Wollen Co.*, 261 Pa. 312, 104 Atl. 617, 2 W. C. L. J. 933; *Hiers v. John A. Hall & Co.*, 164 N. Y. S. App. 863.

Where an employer rejected the act, and an employee suffered an injury in a mine, caused by the foul air therein, and sought recovery of damages in a common-law action, the court said that the question as to whether an occupational disease was covered by the Iowa compensation act was not in the case, but in defining what such a disease it said: "An 'occupational disease' suffered by an employee, if it means anything as distinguished from a disease caused by an actionable wrong or injury, is neither more nor less than a disease which is the usual incident or result of a particular employment in which the workman is engaged, as distinguished from one which is caused or brought about by the employer's failure in his duty to furnish him a safe place to work. If the employer fails in his duty to furnish a safe place to work and the employee is injured, the liability of such employer can not be avoided by calling such injury an occupational disease. This injury having been actionable before the enactment of the workmen's compensation law, was no less actionable afterwards."⁴²

A cigar maker who suffered from Neurosis as a result of his sitting posture while rolling cigars for over twenty-five years, was denied compensation because this was held to be an occupational disease. The court said: "No case has gone so far as to hold that a 'neuresis of the nerves' supplying certain muscles, resulting from a posture which causes the employee 'to bend with shoulders forward so as to induce pressure on the brachial plexus is a personal injury. The words 'personal injury' in their connection in this statute, do not naturally lend themselves to a situation such as that here disclosed. * * * It awards compensation for disease when it rightly may be described as a personal injury. A disease of mind or body which arises in the course of employment, with nothing more, is not within the act. It must come from or be an injury, although that injury need not be a single definite act but may extend over a continuous period of time. Poisoning, blindness, pneumonia, or the giving way of heart muscle, all induced by the necessary exposure or exertion of the employment, fall within well-recognized classes of personal injuries. On the

42. Gay v. Hocking Coal Co., 184 Iowa 948, 169 N. W. 360, 17 N. C. C. A. 346.

other hand the gradual breaking down or degeneration of tissues caused by long and laborious work is not the result of a personal injury within the meaning of the act.⁴³

A lead grinder, seventy-two years of age, who had been engaged in the same employment for more than twenty years, and who became incapacitated as the result of lead poisoning or plumism, suffered a "personal injury" within the meaning of the Massachusetts Act which omits the words, "by accident."⁴⁴

Claimant contracted lead poisoning while employed by a manufacturer of white lead, and became sick and disabled by reason thereof. Compensation was denied on the ground that it was an occupational disease.⁴⁵

Where a workman contracted lead poisoning from working in a room where fumes were arising from molten lead, compensation was denied under the Connecticut act, as the disease was occupational and not a personal injury.⁴⁶

Where a chambermaid contracted dermatitis which resulted in infection of the hands, compensation was denied on the ground that this disease is seldom due to any accident arising out of and happening in the course of employment, although it may be an injury arising out of such employment. In this case the trouble began with what is generally regarded as an occupational disease occurring without the happening of any accident.⁴⁷

A boat builder bruised his knee, from which an abscess formed. Medical experts testified that the injury could only come from

43. In re Maggelet, 228 Mass. 57, 116 N. E. 972, 15 N. C. C. A. 520. But see Pimentals Case—Mass.—127 N. E. 424.

44. Johnson v. London Guar. & Acc. Co., Ltd., 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843. See also, In re Hurle 217 Mass. 223, 104 N. E. 336.

45. Industrial Com. of Ohio v. Brown, 92 Ohio St. 309, 110 N. E. 744, 14 N. C. C. A. 843; Adams v. Acme White Lead Works, 182 Mich. 157, 148 N. W. 485, 6 N. C. C. A. 482, Bennetts Case, Comm. of Ind. of Vt. 1918.

46. Miller v. American Steel and Wire Co., 90 Conn. 349, 97 Atl. 345, 14 N. C. C. A. 842; Re claim of Peters, Vol. 1, Bull. Ind. C. of Ohio for Dec. 1914, pg. 25.

47. McDonald v. Dunn, 2 Cal. I. A. C. D. (No. 1, 1915), 71, 8 N. C. C. A. 1091; Liondale Bleach, Dye & Paint Works v. Riker, 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713.

an accident in such employment. The commission found that the bursitis was not due to occupational disease, but to injury as alleged, and awarded compensation.⁴⁸

Of interest and value in this connection is the recent decision of an English court in a suit for damages at common law, on account of injuries suffered, due to occupational disease. "Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done him, even though the cause from which he suffers might give to others a right of action. For example, one who has agreed to take part in an operation necessitating the production of fumes injurious to health, would have no cause of action in respect of bodily suffering or inconvenience resulting therefrom, though another person residing near to the seat of these operations might well maintain an action if he sustained such injuries from the same cause."⁴⁹

Where an employee, engaged in operating sheet steel finishing rolls, was blinded and invalided by the strong glare of powerful lights from the glittering surfaces he had to inspect, compensation was denied, the court holding this to be an occupational disease, not compensable under the Ohio Act.⁵⁰

Housemaids knee, while an occupational disease common to plumbers and those compelled to work on their knees, has been held to be compensable under the Connecticut act, the commission holding that the date of the injury is the time when the injured person by reason of his illness became unable to work.⁵¹

Where a traffic officer had to stand on his feet eight hours a day, and flat feet or broken arches resulted, compensation was

48. *Porter v. Anderson*, 1 Cal. I. A. C. D. (No. 24, 1914), 46, 8 N. C. C. A. 1093.

49. *Smith v. Baker & Sons*, (1916) A. C. 325, 60 L. J. Q. B. 683, 65 L. T. 367, 13 N. C. C. A. 1084.

50. *Zajkowski v. American Steel and Wire Co.*, 258 Fed. 9, 4 W. C. L. J. 579, 169 C. C. A. 147.

51. *Roberts v. Hitchcock Hdw. Co.*, 1 Conn. C. C. D. 213.

awarded on the ground that the employment especially exposed him to the danger of such injury and that therefore it arose out of and was proximately caused by the employment.⁵²

A workman who contracted pneumonia by wading through wet drifts and working in wet garments in response to an emergency call, in the course of his employment, will not be denied compensation on the ground that this was one of the probable consequences of his employment and therefore an occupational disease.⁵³

Where an employee suffered from eye strain, brought on gradually by the constant use of her eyes extending over a period of seven weeks, compensation was denied.⁵⁴

A workman employed by a coach painter contracted lead poisoning. This was held to be a compensable injury under the British Workman's act.⁵⁵

Under the British Act one who had been employed by several different employers, and is found to be suffering from an occupational disease, may recover compensation in the first instance from the employers in whose service he spent the twelve months immediately preceding the disablement.⁵⁶

Where the occupational disease progressed during several different employments, compensation should be assessed according to the degree of progress the disease attained under each contract of employment, and not according to the time spent in the different employments.⁵⁷

An occupational disease must manifest itself during the contract of employment, otherwise the burden is upon the claimant to establish that it arose out of the employment.⁵⁸

While an employee was engaged in snapping and stripping string beans in a cannery, she noticed a blister or sore upon her

52. *R. M. Hedden v. State Comp. Ins. Fund, & City of San Diego*, 5 Cal. I. A. C. D. 1.

53. *Linnane v. Aetna Brewing Co.*, 1 Conn. W. C. C. D. 677.

54. *Cochran v. Elizabeth A. Fenton*, 1 Conn. W. C. C. D. 690.

55. *Pears v. Gibbons*, 6 B. W. C. C. 722.

56. *Merry & Cunningham v. McGowan*, 8 B. W. C. C. 344.

57. *Barron v. Seaton Burn Coal Co.*, 8 B. W. C. C. 218.

58. *M'Laggart v. Wm. Barr & Sons*, 8 B. W. C. C. 377; *Russell v. Keary* (Sch. Ct. of Session) 8 B. W. C. C. 410.

thumb which later became infected, requiring the amputation of the thumb, this was held to be an accidental injury, and not an occupational disease.⁵⁹

A druggist who, suffering from constant irritation of his eyes, due to poor lights in his working quarters and the fumes arising from the chemicals, was denied compensation for the disability, the commission holding that the injury was due to an occupational disease.⁶⁰

Where a fireman developed a case of lobar pneumonia following exposure and a wetting while fighting a fire, compensation was denied, the court holding that the "pneumonia was brought on, not by an accident but what was in the nature of an occupational disease an event which was an incident to his regular employment."⁶¹

Where an employee had worked for 38 years in a zinc reducing plant and there was no evidence in the record showing any arsenical or lead poisoning prior to the injury for which compensation was sought, and the employee is suddenly stricken with lead poisoning, the court, holding that the disease was an accident and not an occupational disease, said: "The second objection to the judgment is that Adrian (deceased employee) died from an occupational disease incident to the business of smelting zinc. A disability caused in that way or from that source is not to be regarded as an accident, because such a disease has its inception in the occupation and develops over a long period of time from the nature of the occupation and not from any unusual or unforeseen cause or event. For the prevention of such diseases there is a statute (Occupational Diseases Act 'J. & A. Par. 5433') requiring the employer to use certain precautions for the safety of the employee and an action may be maintained against the employer for failure to comply with the provisions of the act (*Wilcox v. International Harvester Co. of America* 278 Ill. 465, 14 N. C. C. A. 728, 116 N. E. 151). For such failure the injured employee is

59. *Pettit v. Mendenhall*, 2 Cal. I. A. C. 238.

60. *Boehme v. Owl Drug Co.*, 2 Cal. I. A. C. 520.

61. *Landers v. City of Muskegon*, 196 Mich. 750, 163 N. W. 43, 14 N. C. C. A. 947.

is not confined to the compensation provided by the workmen's compensation act nor limited by the amount provided by the act. For nearly 50 years in the active operation of the plant of the plaintiff in error a case of lead or arsenical poisoning had never been known, and the plaintiff in error would have had a perfect defense to the death of Adrian on the ground of the failure to obey the statute relating to occupational diseases. There was no evidence tending in any degree to prove that the arsenical poisoning of Adrian was a disease incident to the occupation of plaintiff in error.⁶²

Occupational neuritis resulting from constant work at a typewriter is, under the Federal Act, held to be a compensable injury arising out of the employment.⁶³

§ 224. **Osteomyelitis.**—A workman who was engaged in moving rails, backed into a prop with the result that the rail struck him a blow on the thigh. He continued work for some time, until excessive pain forced him to quit. A physician pronounced the case to be osteomyelitis and septicaemia and advised an immediate operation, which resulted in death. Medical testimony claimed that osteomyelitis might result from a blow. It was held that the death was caused by an accident.⁶⁴

§ 225. **Osteosarcoma from Fall.**—Where an employee claimed to have slipped on a stairway and osteosarcoma to the bone of the

62. *Matthiessen-Hegeler Zinc Co. v. Ind. Bd.*, 284 Ill. 378, 120 N. E. 249, 17 N. C. C. A. 342; *Dragovich v. Iroquois Iron Co.*, 109 N. E. 999, 269 Ill. 478, 10 N. C. C. A. 475; *Frey v. Kerens-Donnewald, Coal Co.*, 271 Ill. 121, 110 N. E. 824; *Armour & Co. v. Industrial Board*, 273 Ill. 590, 113 N. E. 138; *Chicago & Alton R. Co. v. Industrial Board*, 274 Ill. 336, 113 N. E. 629; *Suburban Ice Co. v. Industrial Board*, 274 Ill. 630; *Bloomington D. & C. R. Co. v. Industrial Board*, 276 Ill. 454, 114 N. E. 611; *Ohio Bldg. Safety Vault Co. v. Industrial Board*, 115 N. E. 149, 277 Ill. 96; *Albaugh-Dover Co. v. Industrial Board*, 278 Ill. 179, 115 N. E. 834; *Squire-Dingee Co. v. Industrial Board*, 281 Ill. 359, 117 N. E. 1031.

63. *In re Catherine A. Flynn*, 3rd, A. R. U. S. C. C. 129.

64. *Mills v. Dinnington Main Coal Co. Ltd.*, 1917 W. C. & Ins. Rep. Rep. 390.

knee developed within twenty four hours, compensation was denied on hearing the medical testimony, and because the employer was prejudiced by lack of notice.⁶⁵

§ 226. **Over Work.**—In the absence of evidence of an accident, compensation was denied for the death of an officer who worked almost continuously day and night for several days in loading a ship, and died of heart failure six days after the ship left port. The medical testimony was that the death was due to the continuous strain of overwork.⁶⁶

Where a girl suffered a physical and mental breakdown and aggravation of an old injury as a result of lifting heavy crates and doing other heavy work that was beyond her physical powers, it was held that this was an injury arising out of the employment.⁶⁷

Where an employee suffered from a cerebral hemorrhage caused by heat and overexertion, together with diseased arteries, which terminated in paralysis, compensation was allowed.⁶⁸

An injury is within the act when caused by a strain from rushing work under a time record efficiency system, whereby a strong, healthy man was kept under a high nerve racking tension during every minute of an eight hour work day.⁶⁹

§ 227. **Palmer Abscess.**—Where a foreigner suffered from a palmer abscess, caused by the entrance of a sliver into the palm of his hand, compensation was allowed for the injury and doctor bills.⁷⁰

An employee received an injury to his hand by reason of extreme pressure exerted while cutting a coil of wire with a shears,

65. *Marcontonio v. Charles Francis Press*, (1916), 9 N. Y. St. Dep. Rep. 390.

66. *Black v. New Zealand Shipping Co.*, 1913, 6 B. W. C. C. 720; In re *Frederick E. Walker*, 2nd, A. R. U. S. C. C. 155.

67. *Pidgeon v. Maryland Casualty Co.*, 2 Mass. Ind. A. Bd. 348.

68. *Bell v. Hayes Ionia Co.*, 192 Mich. 90, 158 N. W. 179, 14 N. C. C. A. 532.

69. In re *Manning Op. Sol. Dept. Labor*, 279.

70. In re *Panasuk*, 217 Mass. 589, 105 N. E. 368, 5 N. C. C. A. 688.

from which resulted a palmer abscess, and a septic condition without any visible external wound. This was held to be a compensable injury.⁷¹

An employee was continually handling a hammer, and developed an abscess on his hand as a result of a break in the callous on the palm. Compensation was allowed for the accidental injury, despite the fact that no definite time could be assigned to the occurrence of the break.⁷²

While an employee was cranking an engine it kicked back and injured his hand which injury developed into a palmer abscess. This was held to be an accidental injury.⁷³

§ 228. **Paralysis.**—An employee was awarded compensation for paralysis following heavy lifting. The court reversed the findings because it appeared that the Industrial Board made its award on a finding that the applicant, prior to the time he became dizzy, had fallen down a stairway. There was no evidence tending to show that this fall was in any way connected with the employment.⁷⁴

Where an employee received a fall while carrying planks on a spillway, and later died from paralysis, compensation was allowed, even though the testimony was conflicting as to the cause of the paralysis. The award was affirmed by the appellate court on the ground that the finding of the board was final as to the facts.⁷⁵

Where a coal miner suffered paralysis, following a blow on the head by a falling mine prop, compensation was allowed for total disability.⁷⁶

71. *Erickson v. Mass. Employees Ins Assn.*, 2 Mass. Ind. Acc. Bd., 149, 11 N. C. C. A. 496.

72. *Zavella v. Naughton*, 2 Cal. I. A. C. 688.

73. *Judson v. Southern Cal. Gas. Co.*, 2 Cal. I. A. C. 254.

74. *Bradley Mfg. Works. v. Ind. Bd. of Ill.*, 283 Ill. 468, 119 N. E. 615, 17 N. C. C. A. 250, 2 W. C. L. J. 226; *Barrett Co. v. Indust. Com.*, 288 Ill. 39, 123 N. E. 29.

75. *Homan v. Boardman River Elect. Light & Power Co.*, 200 Mich. 206, 166 N. W. 860, 1 W. C. L. J. 1043, 17 N. C. C. A. 790.

76. *Frey v. Kerens-Donnewald Coal Co.*, 271 Ill. 121, 110 N. E. 324, 15 N. C. C. A. 527; *In re Edward Kinney*, 2nd A. R. U. S. C. C. 125.

Where an employee had a pre-existing disease known as syphilis, and through an accident this disease was aggravated, causing paralysis and insanity, the court affirmed an award allowing compensation.⁷⁷

Where continued work in an excessively hot room resulted in a rupture of the cerebral blood vessel of an employee suffering from arterio sclerosis, the finding that the strain, upon the arteries caused by overexertion and excessive heat resulted in a rupture of a blood vessel in the brain causing paralysis was sustained.⁷⁸

Where a workman strained himself while lifting a barrel, and suffered from apoplexy and paralysis, compensation was awarded.⁷⁹

A workman received an electric shock which threw him against a bench with such force that the heart action was suddenly accelerated, causing a slight hemorrhage of the brain, resulting in paralysis. His incapacity was held to be due to an injury, and compensation was allowed.⁸⁰

Where an employee, while at work, fell out of a window sustaining serious bodily injuries resulting in paralysis, the arbitration board allowed compensation.⁸¹

An employee operating an elevator imagined that he saw a fellow employee about to be killed, and immediately sustained a stroke of paralysis, resulting later in his death. Medical testimony indicated that the paralysis, due to a hemorrhage in the brain, might be caused either by a severe mental shock or by cerebral embolism due to former diseased heart condition, in which case the supposed mental shock might never have occurred in fact but be purely a hallucination due to the cerebral embolism. Such evi-

77. *In re Crowley*, 223 Mass. 288, 111 N. E. 786, 14 N. C. C. A. 141; *Romme v. Atl. Screw Works*, 1 Conn. I. A. C. D. 108.

78. *La Veck v. Park Davis & Co.*, 190 Mich. 604, 157 N. W. 72, 14 N. C. C. A. 141.

79. *Fowler v. Risedorph Bottling Co.*, 175 N. Y. App. Div. 224, 161 N. Y. Supp. 535, 14 N. C. C. A. 533; *Schmidt v. O. K. Baking Co.*, 1 Conn. C. D. 362, 14 N. C. C. A. 539; *Lynch v. Great Atlantic & Pacific Tea Co.*, 1 Conn. C. D. 163.

80. *Milliken v. United States Fidelity & Guar. Co.*, Mass. W. C. C. (1913) 187, 7 N. C. C. A. 647.

81. *Todd v. Grand Trunk R. R. Sys.* Mich. I. A. Bd. (1914), 4 N. C. C. A. 852.

dence is not sufficient to prove that the paralysis and death were due to an accidental injury.⁸²

A workman fell and struck his head, and was unconscious for a half hour, but thereafter showed no signs of injury or cerebral trouble. Cerebral hemorrhage and paralysis occurred three weeks afterwards, and caused death, but were held not to be due to the accident.⁸³

Where a gas fitter, who inhaled coal gas, died two days later of paralysis, but had also had previous attacks of paralysis, the paralysis and death were held not to be due to the gas poisoning.⁸⁴

Where paralysis was gradually brought on by riding a carrier tricycle, it was held that there was no evidence of an accident.⁸⁵

Compensation was allowed to an employee for the loss of a hand rendered useless through paralysis following an injury to his fingers.⁸⁶

Where a fireman, while attempting to clear a passageway of iron beams, felt a pain in his stomach and became weak, and later suffered a paralytic stroke, it was held that his injury was due to an accident.⁸⁷

Paralysis caused by an embolism, where the employee suffered no traumatic accident, was held not to be a compensable injury.⁸⁸

Where a telephone operator sought compensation for facial paralysis, alleged to have been caused by pressure of the head-piece, worn by the operator, compensation was denied, because medical testimony showed that the paralysis was not due to the wearing of the ear phone.⁸⁹

Paralysis caused by an acute attack of anterior poliomyelitis was held not to be the result of an injury when the employee fell

82. *Keck v. Morehouse*, 2 Cal. I. A. C. D. 264 (1915), 10 N. C. C. A. 1048.

83. *McAdoo v. Cudahy Packing Co.*, 2 Cal. I. A. C. D. 512.

84. *Dean v. London & N. W. R. R. Co.*, 3 B. W. C. C. 351 C. A.

85. *Walker v. Hockney Bros.*, 2 B. W. C. C. 20 C. A.

86. *Floccher v. Fidelity & Deposit Co. of Md.*, 221 Mass. 54, 105 N. E. 1032.

87. *Manning v. Pomerene*, 101 Neb. 127, 162 N. W. 492.

88. *Mohr v. Cranford, Inc.*, 7 N. Y. St. Dep. Rep. 376.

89. *Wilson v. Pac. Tel. Co.*, 1 Cal. I. A. C. Part 2, 414.

into ice cold water ten days previous, hence compensation under the Federal Act was denied.⁹⁰

Where the claimant was struck on the head by a swinging door but not with sufficient violence to make a mark on his head, it was held that subsequent paralysis did not result therefrom.⁹¹

§ 229. **Periarthritis.**—Where an employee was struck on the elbow by a falling board, and developed periarthritis, compensation was allowed.⁹²

§ 230. **Peritonitis.**—Where an employee, suffering from an electric shock, later died from peritonitis, compensation was denied because of failure to show any causal connection between the accident and the cause of the death.⁹³

Where a workman slipped and fell on a spillway while carrying planks, and later died from peritonitis caused by paralysis of the brain, it was held that death was due to the accidental fall, and compensation was allowed.⁹⁴

Where a bargeman slipped while attempting to climb out of a prism of a barge canal, striking his abdomen, which aggravated a diseased appendix, causing an acute exacerbation thereof, producing a rupture from which acute peritonitis developed, causing death, compensation was allowed.⁹⁵

One employee turned an air hose upon another employee, in the region of the rectum. This caused the victim to suddenly jerk and straighten his body, causing a rupture of an abscess about the gall bladder, from which deceased was suffering. Acute general peritonitis followed, resulting in his death. This was held to be a compensable injury. This "horseplay" having become common

90. *In re Geo. S. Eggleston*, 3rd A. R. U. S. C. C. 138.

91. *Fink v. Sheldon Axle & Spring Co.* — Pa. —, 113 Atl. 666.

92. *Jirgens v. St. Comp. Ins. Fund*, 2 Cal. I. A. C. 134.

93. *Merriman v. Scovil Mfg. Co.*, 1 Conn. C. Dec. 569.

94. *Homan v. Boardman River Light and Power Co.*, 200 Mich. 206, 166 N. W. 860, 17 N. C. C. A. 790, 1 W. C. L. J. 1043.

95. *Lindquest v. Holler*, 178 N. Y. App. Div. 317, 164 N. Y. Supp. 906, 14 N. C. C. A. 432; *Western Indem. Co. v. Indus. Acc. Comm.*, — Cal. —, 168 Pac. 663, 1 W. C. L. J. 478.

and continued with the knowledge of the employer was one of the risks of the employment.⁹⁶

A coal heaver received a blow on the stomach from falling coal. An operation revealed that he was suffering from perforation of the bowel, and also from appendicitis of some standing. He died three days later. A post mortem revealed a second perforation which was not in existence at the time of the operation, and it was found that death had resulted from peritonitis caused by the second perforation. Compensation was denied because of failure to show any causal connection between the accident and the cause of the death.⁹⁷

Where an operation for appendicitis was made necessary because of traumatic peritonitis, it was held to be a personal injury.⁹⁸

Where deceased fell from a ladder and sustained numerous injuries, and later died from appendicitis peritonitis, it was held, upon conflicting medical testimony, that there was a relation between the accident and the death, and compensation was allowed.⁹⁹

Applicant suffered from peritonitis caused by a foreign substance which had lodged in the abdomen years before but inflammation was precipitated by a blow on the abdomen. In the absence of any other factor which might cause the peritonitis, the board held that it resulted from the blow.¹

Where an employee, who was undergoing an operation for hernia, which resulted from an injury, requested that he be operated upon for appendicitis at the same time, and died as the result of peritonitis, which developed from the appendicitis operation, the court held that the death was not due to the accidental injury.²

96. *In re Loper*, 64 Ind. App.—, 116 N. E. 324, 15 N. C. C. A. 284.

97. *Woods v. Thomas Nelson Sons & Co.*, (1913), W. C. & Ins Rep. 569.

98. *Gregg v. Frankfort Gen. Ins. Co.*, 2 Mass. I. A. Bd. 581.

99. *Euman v. James Dalziel & Co.*, (1913), Ct. of Sessions Cas. 246, (1913), W. C. & Ins. Rep. 49, 10 N. C. C. A. 763, 6 B. W. C. C. 900.

1. *Henne v. Hjul*, 1 Cal. I. A. C. D. 133.

2. *Hoffman v. Pierce Arrow Motor Car Co.*, 183 N. Y. S. 766, (1920), 6 W. C. L. J. 569.

§ 231. **Pleurisy.**—Where an employee was struck by a broken belt and injured about the face, nose and right side, and as a result thereof traumatic pleurisy set in, which later developed into pneumonia and other diseases, causing death, compensation was allowed.³

An undertaker's employee suffered an injury, alleged to have been caused by an accident in moving a coffin, which developed into pleurisy, followed by pneumonia, causing death. The recorder found that the death was due to the injury by accident, and compensation was allowed.⁴

An employee, in order to avoid injury when a crane which he was operating broke, jumped into a river, and pleurisy and tuberculosis resulted. The court held this to be an accidental injury, and allowed compensation.⁵

Where a canvasser and collector, who was hurrying with his work, developed pleurisy from becoming overheated and then chilling, it was held not to be a personal injury by accident.⁶

Where an employee had undergone an operation in which two of his ribs were removed, and later he received an accidental injury which caused pleurisy and aggravation of a condition of empyema, which caused disability for an extended period of time, the Board held this to be an accidental injury.⁷

An employee was struck in the chest by the arm of a knitting machine, but continued to work against his physician's advice, and twelve days after the accident he was found to be suffering from traumatic pleurisy, which caused his death. Compensation was allowed.⁸

3. *Vogeley v. Detroit Lbr. Co.*, 196 Mich. 516, 162 N. W. 975, 14 N. C. C. A. 142; *Diaz v. American Mutual Liab. Ins. Co.*, 1 Mass. Ind. A. Bd. 430; *In Re Herbert G. Dupree*, 3rd A. R. U. S. C. C. 133.

4. *Wright v. Kerrigan*, (1911), 2 Ir. R. 310, 45 Ir. L. T. 82.

5. *Rist v. Larkin & Sangster*, 171 App. Div. 71, 156 N. Y. Supp. 875.

6. *McMillan v. Singer Sewing Mach. Co., Ltd.*, (1913), 6 B. W. C. C. 245 Ct. of Sess.; *In re Chas. E. Davis*, 3rd A. R. U. S. C. C. 132; *In Re Albert C. Mills*, 3rd A. R. U. S. C. C. 133.

7. *Bakiewicz v. National Brake and Electric Co.*, 4 Annual-Rep. (1915), Wis. Ind. Com. 11.

8. *Greenberg v. Canadian Knitting Mills*, S. D. R. Vol. 10, p. 572, 178 App. Div. N. Y. 942.

Compensation was awarded for injuries received by a mason's helper from falling brick. He recovered sufficiently to go about, and three months after the accident he died from pleurisy. The commission's physician was of the opinion that "traumatic pleurisy should have made its appearance a good deal earlier." Compensation for his death was denied.⁹

§ 232. **Pneumonia.**—Where post operative or ether pneumonia followed an operation, made necessary by the accidental injury, and caused death, compensation was allowed.¹⁰

Where an employee was suffering from bloodpoisoning, and because of his lowered vitality he developed pneumonia, which caused his death, compensation was allowed.¹¹

Where a miner developed pneumonia caused by the inhalation of poisonous gas, generated by a blast explosion, when the amount of gas far exceeded that usual to this method of blasting, it was held to be due to accident.¹²

A workman met with an accident to his arm, was taken to a hospital, the arm placed in splints, and he was sent home. The next day he was found to be suffering from acute pneumonia, from which he died. It was held that death had resulted from the injury.¹³

9. *Henry v. Fuller Co.*, 179 N. Y. App. Div. 952, 165 N. Y. Supp. 1091.

10. In re Bently, 217 Mass. 79, 4 N. C. C. A. 559, 104 N. E. 432; In re Raymond, Mass. W. C. Rep. (1913), 277; *Favro v. Board of Public Library Trustees*, 1 Cal. Ind. A. C. D. (No. 15, 1914) 1, 6 N. C. C. A. 627; *Shirt v. Calico Printers' Assn., Ltd.*, 78 L. J. K. B. 528, (1909), 2 K. B. 51, 100 L. T. 740, 25 T. L. R. 451, 53 Sol. J. 430, 2 B. W. C. C. 342, 6 N. C. C. A. 628; *Jendrus v. Detroit Steel Products Co.*, 178 Mich. 265, 4 N. C. C. A. 864, 144 N. W. 563, L. R. A. 1916A, 381, Ann. C. 1915D, 476.

11. *Wittelberger v. Rach*, 181 Mich. 463, 4 N. C. C. A. 915; *Bayner v. Riverside Storage and Cartage Co.*, 181 Mich. 378, 4 N. C. C. A. 916, 148 N. W. 412; *Wiersum v. Nachtegall Mfg. Co.*, Mich. I. A. Bd. 4 N. C. C. A. 916; *Merritt v. Traveler's Insur. Co.*, 2 Mass. W. C. C. 635; *Tanner v. Aluminum Castings Co.*, — Mich. —, (1920), 178 N. W. 69, 6 W. C. L. J. 337.

12. *Kelley v. Auchenlea Coal Co., Ltd.*, 1911 S. C. 864, 48 Sc. L. R. 768; 3 B. W. C. C. 417, 4 N. C. C. A. 911.

13. *Cameron v. Port of London Authority*, (1915), 5 B. W. C. C. 416; 4 N. C. C. A. 909.

A debilitated workman, who had injured his knee, contracted pneumonia as a result of being compelled, because of the pain in his knee, to take a long time to get home on a cold day. This was held to be an accidental injury, compensable under the English act.¹⁴

Where a workman, hired as a member of a fire brigade to help protect his employer's property, was 'wet to the skin' with water, and inhaled smoke, while fighting fire, 40 feet from his employer's premises, and died of lobar pneumonia, his death was held to have resulted from an injury.¹⁵

Where an employee fell 3 feet and landed in a sitting position, and complained of pain and stiffness for a few days, and about a week later he was seized with convulsions, and died from pneumonia, compensation was denied on the ground that no connection was shown to exist between the accident and the cause of the pneumonia which resulted in death.¹⁶

A night watchman fell and fractured the neck of the right femur. Later he died from static pneumonia while still in the hospital recovering from his injury. It was held that the death was due to the injury received in the course of his employment.¹⁷

Where an employee, engaged in making shells, received scratches on his hands which became infected, causing blood poisoning, which later developed into pneumonia, which resulted in his death, compensation was allowed, although it was not shown just the exact time when the infection occurred.¹⁸

14. *Ystradowen Colliery Co., Ltd., v. Griffiths* (1910), 2 B. W. C. C. 357, C. A.

15. *In re McPhee*, 222 Mass. 1, 109 N. E. 633, 10 N. C. C. A. 257; *In re Harry O. Walters*, 3rd A. R. U. S. C. C. 135; *In re John J. McKenna*, 2nd A. R. U. S. C. C. 191.

16. *Senter v. Klyce*, 2 Cal. Ind. A. C. 695; *Currie v. Royal Indem. Co.*, 2 Mass. Ind. A. Bd. 174, 11 N. C. C. A. 507; *Shay v. Christian Feigenspan Corp.*, 1 Conn. Comp. Dec. 232; *Lucien v. Judson Mfg. Co. & Cal. Casualty Ins. Co.*, 1 Cal. Ind. A. C. part 2, 59; *In re Henry Schiller*, 2nd A. R. U. S. C. C. 104.

17. *Oberg v. McRoberts & Co.*, 6 N. Y. S. Dep. Rep. 386; *Dependent of John Marx v. City of Bridgeport*, 2 Conn. C. Dec. 227; *In re John B. Wirt*, 3rd A. R. U. S. C. C. 136; *In re Albert L. Gordon*, 3rd A. R. U. S. C. C. 137; *In re Andrew Fletcher*, 3rd A. R. U. S. C. C. 138.

18. *Burvill v. Vickers, Ltd.*, (1915), W. C. & Ins. Rep. 563, 13 N. C. C. A. 1020.

A lineman was exposed to bad weather and developed pneumonia, from which he died. Compensation was denied because of lack of any showing of connection between the exposure and the disease which caused the employee's death.¹⁹

A mine inspector, after making his rounds, was compelled to wait for a time at the bottom of a shaft for a car to take him to the surface. While waiting he was exposed to a very cold current of air from a ventilating shaft. He contracted pneumonia therefrom and died. The House of Lords held this was not an accident.²⁰

A fireman, due to the illness of a fellow fireman, was called to work at 2 a. m. He came to work through a severe snow storm, getting wet to the waist, and worked in his wet clothes for 12 hours. He arrived home exhausted, subsequently contracting a severe cold, but he worked for a week, when pneumonia developed, causing his death. The court said: "We must recognize the fact that in common speech and understanding a bodily injury, whether manifest to the senses at the time it is sustained or subsequently revealed by functional disturbance is always assignable to some definite part or organ of the body, and when caused by accident is always sustained at the time of the accident or at least during the time within which the accidental condition is operative. An accidental bodily injury therefore may be defined as a localized abnormal condition of the living body directly and contemporaneously caused by accident; and an accident may be defined as an unlooked-for mishap or untoward event or condition not expected. The concurrence of accident and injury is a condition precedent to the right to compensation. On this record the unusual weather conditions or the consequent untimely and prolonged hours of labor or both may be said to supply the element of an untoward

19. *Bockwich v. Housatonic Power Co.*, 1 Conn. C. D. 266; *In Re Alveros W. Fletcher*, 3rd A. R. U. S. C. C. 134; *In Re Herman C. Heffner*, 3rd A. R. U. S. C. C. 136; *In Re Robert F. Parks*, 3rd A. R. U. S. C. C. 136; *In Re Wm. H. Lynch*, 3rd A. R. U. S. C. C. 183; *In Re Wm. J. Lehr*, 2nd A. R. U. S. C. C. 183; *In Re Calvin K. Carnes*, 2nd A. R. U. S. C. C. 189.

20. *Lyons v. Woodlee Coal & Coke Co., Ltd.*, (1917), W. C. & Ins. Rep. 235, 15 N. C. C. A. 694; *Langley v. Reeve*, 3 B. W. C. C. 175.

and unexpected condition of the employment. The direct and contemporaneous result of this accidental condition was exhaustion, and the record therefore shows that the decedent was accidentally exhausted on Dec. 14th. It is clear however, that exhaustion although accidentally incurred is not in and of itself a bodily injury either according to common speech and understanding or according to the above definition; for it may or may not overcome the elastic resistance of the system and may or may not result either in a bodily injury or in a disease. * * * We are not at liberty to construe the act so as to include diseases which are caused by accident without the intervention of bodily injury. To construe the act as denying compensation in cases of occupational disease and yet granting it in case, for example, of influenza from working near a window inadvertently left open, would impute to the general assembly the intention to make a distinction which appears to us to be unjust and inconsistent with the principles underlying all legislation on the subject of workmen's compensation." ²¹

The husband of claimant came in contact with a live wire, causing him to fall 28 feet, his knees striking his chest violently, which "resulted in continuous pain from the time of the accident until the trouble was diagnosed by the physician as lobar pneumonia, and we find nothing in the record to justify the inference that between the time of the injury and the development of the disease there were other causes from which pneumonia might have been contracted. * * * The injury to the chest was the proximate cause of the disease." ²²

A fireman died of lobar pneumonia four days after a fire during which he was exposed to wet and cold for 12 hours. The court held that the "pneumonia was brought on, but not by an un-

21. *Linnane v. Aetna Brewing Co.*, 91 Conn. 158, 99 Atl. 507 (1916).

22. *Murdock v. New York News Bureau et al.*, 263 Pa. 502, 106 Atl. 788, 4 W. C. L. J. 451, (1919); *Bresleves Co. v. Indus. Comm. of Wis.* 167 Wis. 202, 167 N. W. 256; *Cledou v. Hof Brau Cafe*, 3 Cal. Ind. Acc. Com. 233.

expected event, but by an event which was an incident to his regular employment." ²³

Where a miner, perspiring as a result of his work, was compelled, due to a breakdown of the machinery, to stand in a shaft exposed to a draft of cold air, from which he contracted pneumonia and died, it was held that the man's death resulted from an injury by accident. ²⁴

Where a miner, due to the breaking of a pump, was compelled to stand in water for a time, as a result of which he contracted pneumonia and died, it was held to be an accidental injury. ²⁵

Where an employee suffered an accidental injury, and as a result was exposed to stormy weather for one hour and a half, and in a few days developed pneumonia while in a hospital, it was held that the accident was the proximate cause of the pneumonia. ²⁶

Where an employee was struck a severe blow in the face by a power belt, which broke, and in a few days he died of pneumonia, which developed from the traumatic pleurisy that resulted from the blow, it was held that the evidence was sufficient to support the finding that pneumonia was the contributing cause of death. ²⁷

Where the verdict of the corner's jury was introduced in evidence this was held to be sufficient to sustain an award, where it showed that traumatic pneumonia resulted from an injury sustained by decedent when he fell from a wagon which he was driving for plaintiff in error. ²⁸

Where a brewery employee slipped and fell, dislocating his clavicle, was operated on three days later and, due to a weakened condition of his system brought on by the operation, he develop-

23. *Landers v. City of Muskegon*, 196 Mich. 750, 163 N. W. 43, 14 N. C. C. A. 947.

24. *Brown v. Watson*, 7 B. W. C. C. 259.

25. *Alloa Coal Co. v. Drylie*, 6 B. W. C. C. 398; *Smith v. McPhee etc. Co.*, 1 Cal. Ind. Acc. Com. 197.

26. *Decormier v. Western Indemnity Co.*, 2 Cal. Ind. Acc. Com. 756, 12 N. C. C. A. 326.

27. *Vogele v. Detroit Lumber Co.*, 196 Mich. 516, 162 N. W. 975; *Marlmen v. Record F & M. Co.*, 106 Atl. 606, 4 W. C. L. J. 205.

28. *Armour & Co. v. Industrial Board of Ill.* 273 Ill. 590, 113 N. E. 138.

ed hypostatic pneumonia and died from its effects, it was held that death resulted from the injury.²⁹

A healthy workman, employed on a ship, went to work at one o'clock, and at three climbed up the ladder of the hold, apparently in great pain. Marks were found on his ribs. He died three days later from pneumonia, caused by the injury to his side, according to medical testimony. It was held that the death was due to the injury by accident, and compensation was awarded.³⁰

Where a caretaker of a large mansion fell down stairs, and pneumonia developed from the injuries and he died without regaining consciousness, compensation was allowed.³¹

Where a lumberman, who was confined to the hospital because of a fracture of his leg, developed pneumonia and died, the death being hastened by his poor physical condition, brought about by the confinement and inaction, it was held that the pneumonia and consequent death was due to the injury.³²

Where a workman was thrown from his horse while hunting, and was wet to the skin, and because of loss of vitality, caused by the fall, took pneumonia and died, the accident was the direct cause of his death.³³

Where two doctors testified that pneumonia, causing the death of a workman four years after an accident to him, was due indirectly to the accident, and two testified that the disease was due to lowered vitality caused by the accident, it was held that the death was not due to the accidental injury.³⁴

29. *Cantwell v. Travelers Ins. Co.*, 2 Mass. I. A. Bd. 246.

30. *Lovelady v. Berrie* (1909), 2 B. W. C. C. 62; *Homan v. Boardman River Elect. Co.*, 200 Mich. 206, 166 N. W. 860, 17 N. C. C. A. 790, 1 W. C. L. J. 1043.

31. *Skelton Acc. Ins. Co.*, Mass. Wkm. Comp. Cas. No. 2336 Nov. 3, 1915, 12 N. C. C. A. 656.

32. *Majeau v. Sierre Nevada Wood and Lumber Co.*, 2 Cal. I. A. C. D. 443.

33. *In Re Etherington & Lancashire & Yorkshire Acc. Inc. Co.*, 1909 K. B. 591, C. A.

34. *Taylor v. Framewellgate Coal & Coke Co., Ltd.* (1913) 6 B. W. C. C. 56, C. A.

A workman, who was suffering from a hernia resulting from an accident, was operated upon, but because of his weakened condition only an old hernia was operated on. Later another operation was performed, and while convalescing from the effects of this operation he contracted pneumonia and died. His death was held to be due to the injuries sustained in his employment.³⁵

Where a workman died of septic pneumonia, resulting from systemic sepsis, which developed from a wound received while firing an oven in defendant's bakery, compensation was allowed for the injury.³⁶

A workman, who was wet through while fighting fire, continued work for twenty days thereafter, and then died from lobar pneumonia. Evidence showed that he had no fever prior to the day before his death, and that he had been exposed to bad weather in the meantime. It was held that the pneumonia was not due to the exposure while fighting fire.³⁷

Where an employee developed pneumonia as a result of an automobile trip he had taken while convalescing from an injury to his ankle, it was held that the pneumonia resulted from the injury received in the course of employment.³⁸

Lowered vitality following injury to the chest cavity or to other parts of the body terminated in death from pneumonia in five cases, the awards of which the Appellate Division affirmed unanimously and without opinion, to-wit: a laborer who strained his side by heavy lifting and walked home through cold and snow;³⁹ an aged workman who slipped, fell and hurt his hand and arm, infection resulting;⁴⁰ a shoe treer, whose exertion and

35. *Moore v. William Harkins & Sons*, 4 N. Y. S. Dep. Rep. 383.

36. *Reck v. Whittlesberger*, 181 Mich. 463, 142 N. W. 247, Ann. Cas. 1916 C. 771.

37. *Liedman v. Chelsea Fiber Mills*, The Bulletin N. Y. Vol. 1, No. 10, pg. 16.

38. *Bergstrom v. Indus. Com.* 286 Ill. 29, 121 N. E. 195.

39. *Goepfner v. Henning*, S. D. R., Vol. 11, p. 603, Nov. 20, 1916, 178 App. Div. 943, May 2, 1917.

40. *Sturges v. King Sewing Machine Co.*, Death File, No. 18933, May 29, 1917, 181 App. Div. 911, Nov. 14, 1917.

bending over his work caused a hernia;⁴¹ a laborer who cut his little finger while washing bottles, infection resulting;⁴² and a coat-hoist engineer who sprained his ankle in a complete somersault over a stair railing, while descending to get his pay envelope.⁴³

Where an employee accidentally fell upon the floor and received a blow upon the chest, which later caused pneumonia, it was held to be an industrial injury, and compensation was awarded.⁴⁴

Pneumonia following a scratch on the hand from a rusty pipe, was held to be compensable.⁴⁵

Pneumonia causing death, resulting from exposure to cold while storing frozen meats in a refrigerating room, has been held not to be an industrial injury within the meaning of the act.⁴⁶

Where an employee received an injury to his ankle by a wagon passing over it, and developed pneumonia, from which he died 12 days later, it was held that a casual connection was established between the injury and the cause of the death.⁴⁷

Pneumonia following from wet feet in a leaky boat, was held to be compensable.⁴⁸

Compensation was awarded for the death of an employee, resulting from pneumonia, contracted as a result of an injury sustained when he fell out of a window, which he was trying to open.⁴⁹

An employee received an injury to his finger necessitating amputation. After recovery from the effects of the operation he returned to work and contracted pneumonia, from which he died. Compensation was denied because of lack of proof showing any connection between the injury and the cause of death.⁵⁰

41. *Coons v. Endicott Johnson & Co.*, S. D. R., Vol. 14, P. 565, BuL Vol. 2, p. 203, 1917, 181 App. Div. 963, Dec. 28, 1917.

42. *Rodgers v. Bordens Condensed Milk Co.*, Death File. No 27351, July 13, 1917, 182 App. Div. 906, Jan. 18, 1918.

43. *Graham v. Brooklyn Union Gas. Co.*, Death Case No. 10594, Jan. 2, 1918; —, App. Div. — March 15, 1918.

44. *Cledou v. Hof Brau Cafe*, (1916), 3 Cal. I. A. C. 233.

45. *Coyle v. Mass. Employees Ins. Assn.* — 2 Mass. I. A. Bd. 704.

46. *Hoefler v. Matson Nav. Co.* (1916), 3 Cal. I. A. C. 194.

47. *Costello v. U. S. Cas. Co.*, 1 Mass. I. A. Bd. 265.

48. *Stone v. Travelers Ins. Co.*, 1 Mass. Ind. A. Bd. 470.

49. *Dodd v. Lancashire Corp.*, 9 N. Y. St. Rep. 281.

50. *Stanley v. Wood*, 6 N. Y. St. Dep. Rep. 382.

Where death resulted from lobar pneumonia caused by a game protector immersing his arm and shoulder in the water to remove a plug, while fixing a boat for winter quarters, his death was held to be due to an accidental injury. " 'Accident' meaning an undesigned and unforeseen occurrence of an afflictive or unfortunate character, and 'injure' meaning to harm, or to inflict damage or detriment." ⁵¹

§ 233. **Proof of Accident.**—"It is settled by our decisions that before an employee is entitled to recover compensation he must establish the fact that he received an accidental injury which arose out of and in the course of his employment." It was so held where an employee suffered a right inguinal hernia while assisting in lifting a heavy timber, but there was no evidence that he slipped or fell or was struck by the timber while lifting it. ⁵³

"It is not necessary that some witness should testify to seeing an accident arising out of and in the course of employment, if it is shown in some way that while the employee is at work there has been a recent accident or some circumstances tending to show the fact. *Peoria Cordage Co. v. Industrial Board of Illinois*, 284 Ill. 90, 17 N. C. C. A. 245, 119 N. E. 996 (1918). "The employee is not required to prove the exact cause of his injury. It must happen in the course of his employment and it must arise out of it. These facts must not be left to mere surmise and conjecture; but

51. *Christian v. State Conservation Commission*, — App. Div. —, 1920, 182 N. Y. Supp. 347, 6 W. C. L. J. 199.

Additional cases in which it was held that there did exist a causal connection between the injury and the pneumonia causing the workman's death.

Bayne v. Riverside Storage & Cartage Co., 181 Mich. 378, 148 N. W. 412; *Zabriskie v. Erie R. Co.*, 86 N. J. Law, 266, 92 Atl. 385, L. R. A. 1917A, 315; *Sexton v. Newark Dist. Telegraph Co.*, 84 N. J. Law, 85, 86 Atl. 451, affirmed 86 N. J. Law, 701, 91 Atl. 1070; *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *Hulley v. Moosbrugger*, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203; *Jackson v. Erie R. R. Co.*, 86 N. J. Law, 550, 91 Atl. 1035; *Delaware, L. & W. R. R. Co. v. Hardy*, 59 N. J. Law, 35, 84 Atl. 986.

53. *Tackles v. Bryant & Detwiler Co.*, 200 Mich. 350, 167 N. W. 36, 1 W. C. L. J. 1031; *In re Henry C. Smith*, 3rd A. R. U. S. C. C. 105.

it is not essential that he should prove the precise cause which produced the injury." *Beans Case*, 227 Mass. 558, 116 N. E. 826 (1917). The evidence and the inferences that may fairly and reasonably be drawn therefrom must sustain the finding of a compensable accident without the necessity of resorting to inferences drawn from other inferential facts.⁵⁴

Where there was no direct proof of suicide, the presumption against it in favor of an accident is sufficient to sustain an award, where an elevator operator was found dead at the bottom of an elevator pit.⁵⁵

Where a seaman disappeared overboard from a deck that had a three and one-half foot railing around it, the court said that in spite of the presumption against suicide, he was unable under the circumstances to infer "that death of the deceased was due to an accident."⁵⁶

It was held that the claimant had not sustained the burden of proving that deceased's hernia, from which he died arose out of the employment and was caused by some violent physical exertion and these facts could not be inferred from the mere fact that he was engaged in heavy work. The hearsay testimony of a fellow workman was held not competent.⁵⁷

"It was not necessary for the dependent to exclude the possibility that her husband's death might have been due to an apoplectic shock, as suggested by the insurer but only to satisfy the board by a fair preponderance of the evidence that it was due to a fall from the trestle. Such an external accident is indicated by all the facts and supported by the age and physical condition of the employee when seen a few minutes before he was found under the trestle."⁵⁸

54. *New Castle Foundry Co. v. Lysher* (Ind. App.) 120 N. E. 713.

55. *Wishalass v. Hammond Standish & Co.*, 201 Mich. 192, 166 N. W. 993. *Westmans Case* 118 Me. 133, 106 Atl. Rep. 532, 4 W. C. L. J. 213, (1919) But see *Grand v. Fleming Bros. Co.*, —Ia.—, 176 N. W. 640, 5 W. C. L. J. 688.

56. *Rourke v. Holt & Co. W. C. & Ins. Rep.* 51 Ir. L. T. 121.

57. *Chicago & A. R. Co. v. Industrial Bd. of Ill.*, 274 Ill. 336, 113 N. E. 629, 14 N. C. C. A. 542.

58. *In re Uzzio* 228 Mass. 331, 117 N. E. 349, 17 N. C. C. A. 255.

Accident cannot be proved by hearsay testimony alone.⁵⁹

Proof of an accident must be based upon something more than a mere guess, conjecture or surmise, though it may be proved by circumstantial as well as direct evidence.⁶⁰

"The record does disclose that the deceased sustained an injury, and during his disability received compensation; but it is further incumbent upon the claimant to show, by competent evidence from which fair inference could be drawn, that his death resulted from the injury. This the claimant has failed to do, and compensation for the death must therefore be denied."⁶¹

Where it was entirely a matter of conjecture as to whether an employee had fallen and suffered his injuries as a result of a slight dizziness that occasionally seized him, or had fallen over some nails, the court reversed the finding in claimant's favor.⁶²

"When the employee dies at his post of duty, a presumption may reasonably be entertained that he was then performing his duty and engaged in the work for which he was employed, from which a causal relation between his employment and the accident may be inferred."⁶³

§ 234. **Proximate Cause.**—In so far as the disability of the employee is the natural consequence of the accident compensation should be awarded; but in so far as it is due to the "employee's

59. *McCauley v. Imperial Woolen Co.*, 261 Pa. 312, 104 Atl. 617.

60. *Peoria Ry. T. Co. v. Indus. Bd. of Ill.*, 279 Ill. 352, 116 N. E. 651, 15 N. C. C. A. 632; *Ohio Building Vault Co. v. Indus. Bd.* 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224; *Swift & Co. v. Indus. Comm.* 287 Ill. 564, 122 N. E. 796, 4 W. C. L. J. 35 (1919)

61. *Perry v. Woodward Bowling Alley* 196 Mich. 742, 163 N. W. 52. L. R. A. 1916 A, p. 133; *Retmier v. Cruse* (Ind. App.) 119 N. E. 32, 1 W. C. L. J. 971.

62. *Wilson v. Phoenix Furniture Co.*, 201 Mich. 531, 167 N. W. 839, 17 N. C. C. A. 785.

63. *Hills v. Blair*, 182 Mich. 22, 148 N. W. 243, *Bemel etc. Co. v. Loper*, 64 Ind. App. —, 117 N. E. 527; *Papinaw v. Grand Trunk etc. Co.*, 189 Mich. 448, 155 N. W. 545; *Wishcaless v. Hammond*, 201 Mich. 192, 166 N. W. 933; *Mallman v. Record F. & M. Co.* 118 Me. 172, 106 Atl. 606, 4 W. C. L. J. 205, (1919).

own wilful refusal to submit himself to a safe and simple medical treatment," compensation should be denied.⁶⁴

"The evidence was that an operation for the removal of a cataract is neither serious nor dangerous to an ordinary person in good health and a very large majority of such operations are successful. * * * The question was whether the total loss of sight was attributable to the accident, which caused the slow growth of a cataract, or to an unreasonable refusal to have the cataract, which caused the loss of vision, removed. * * * Under the finding the loss of sight should be attributed to such refusal and not to the accident."⁶⁵

"Before the defendant is to be charged, in law or morals, with the duty to compensate him, the claimant shall first discharge the primary duty owing to himself and society to make use of every available and reasonable means to make himself whole. This, in our opinion, he has not done, and the defendant seems to have discharged the burden of proving that the claimant's refusal to submit to the operation to relieve him is unreasonable."⁶⁶

Where the result of a proposed operation was problematical the court held that it could not be said that the applicant acted in a willful, unreasonable or negligent manner, and therefore that compensation should not under the circumstances be reduced or terminated because of his failure to undergo the proper operation.⁶⁷

"Under the law in force prior to the workmen's compensation act the principle was well established that a person injured by the negligence of another must use ordinary care to avoid aggravating or prolonging the effects of such injury, and that he

64. *Lesh v. Illinois Steel Co.*, 163 Wis. 124, 157 N. W. 539, 15 N. C. C. A. 80.

65. *Joliet Motor Co. v. Indus Bd. of Ill.*, 280 Ill. 148, 117 N. E. 423, 15 N. C. C. A. 75.

66. *Kricinovitch v. American Car & Foundry Co.*, 192 Mich. 687, 159 N. W. 362, 15 N. C. C. A. 80.

67. *Marshall v. Ransome Concrete Co.*, 33 Cal. App. 782, 166 Pac. 846, 15 N. C. C. A. 82, *Bruce v. Taylor & Maliskey*, 192 Mich. 34, 158 N. W. 153.

cannot recover for an increase of disability caused by his failure to use such care. * * * An additional injury to McCay, caused by carelessly using his arm too soon, is as much a new injury not within the terms of the constitution or statute, as if it had occurred by accident. The commission, upon the facts shown, was therefore without power to award compensation for the additional disability.⁶⁸

Where there is conflict in the testimony as to whether the accident or some independent, intervening cause or disease is the proximate cause of the disability or death, and the industrial board finds as a fact that one or the other was the proximate cause that finding will not be disturbed by the court on appeal.⁶⁹

Claimant's deceased fell in the course of his employment and sustained a severe fracture of his leg. Two days later he suffered an attack of delirium tremens, from which he died. It was contended that the delirium tremens and not the injury was the proximate cause of the death. The court said: "The fact that his system had been so weakened by his intemperate habit that it was unable to withstand the effects of the injury does not thereby shift the proximate cause of death from his injury to his intemperate habit." It appeared that the tremens would not have developed had it not been for the injury and the shock following it.⁷⁰

Where particles of steel lodged in the eye of a lathe operator, and the eye became infected with gonorrhea, it was held that the loss of the eye was due to rubbing it with claimant's fingers on

68. *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24, 15 N. C. C. A. 83.

69. *Vogley v. Detroit Lumber Co.*, 196 Mich. 516, 162 N. W. 975, 14 N. C. C. A. 142; *Linstedt v. Louis Sands Salt & Lumber Co.*, 190 Mich. 451, 157 N. W. 64, 14 N. C. C. A. 142; *Deem v. Kalamazoo Paper Co.*, 189 Mich. 655, 155 N. W. 584, 14 N. C. C. A. 143; *La Fleur v. Wood*, 178 App. Div. 397, 164 N. Y. Supp. 910, 14 N. C. C. A. 143; *Tanner v. Aluminum Castings Co.*, — Mich. —, (1920), 178 N. W. 69, 6 W. C. L. J. 337; *Jackson v. Indus. Comm.*, — Cal. App. —, (1921), 191 Pac. 719.

70. *Ramlow v. Moon Lake Ice Co.*, 192 Mich. 505, 158 N. W. 1027, L. R. A. 1916F. 955, 14 N. C. C. A. 295.

which were gonorrhea germs, and was not proximately due to the accidental injury.⁷¹

"The personal injury must be the result of the employment and flow from it as the inducing proximate cause. The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery. The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being. A high degree of discrimination must be exercised to determine whether the real cause of an injury is disease or the hazard of the employment. A disease which under any rational work is likely to progress so as finally to disable the employee does not become a 'Personal injury' under the Act merely because it reaches the point of disablement while work for a subscriber is being pursued. It is only when there is a direct casual connection between the exertion of the employment and the injury that an award of compensation can be made. The substantial question is whether the diseased condition was the cause or whether the employment was a proximate contributing cause. In the former case no award can be made; in the latter, it ought to be made."⁷²

"It is a principle of very general application that the industry should be chargeable only with those consequences arising out of accidents which are proximate and direct, and can not be held chargeable under the law as it now stands for disabilities which are only remotely consequent upon the injuries."⁷³

A conflict of authority exists on the question of allowing compensation beyond the normal period of disability for the particular injury, where the continuing disability is proximately due to some subsequent separate or supervening cause. "This com-

71. *McCoy v. Michigan Screw Co.*, 180 Mich. 454, 147 N. W. 572, 5 N. C. C. A. 455.

72. *In re Madden*, 222 Mass. 487, 111 N. E. 379; *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24.

73. *Masich v. Northwestern Pac. R. Co.*, 2 Cal. Ind. Acc. Com. 539; *In re Grafton Harcus*, 3rd A. R. U. S. C. C. 130; *Jackson v. Indus. Comm.*, — Cal. —, (1921) 195 Pac. 719.

mission has already held that, where recovery from injury is delayed by the effect of tuberculosis, syphilis or chronic varicose ulcers, compensation should be allowed only for the period for which the injury complained of would disable a person of average conditions not suffering from any of these diseases. These exceptions control the present case, and it is therefore decided that applicant is not entitled to a continuance of the temporary total disability payments from and after the 2d day of August, 1914, this date being the expiration of the longest period clearly indicated by the medical testimony in this case as the period during which applicant's disability would probably have continued if he had been free from tuberculosis.⁷⁴

The above rule which is followed by the California, Massachusetts, and Connecticut commissions is contrary to that of the Supreme Courts of Michigan, New York, Indiana, and the English cases.⁷⁵ (See Connecticut Act § 5341 Am. 1921.)

Paralysis from apoplectic stroke, three hours after a severe fall, was held to have been proximately caused by the fall.⁷⁶

Where death resulted from tubercular pneumonia following an anaesthetic for hernia operation, the death was held to have been proximately caused by the injury. The commission held that the employer took the deceased subject to his tubercular condition at the time of entering the employment, though the evidence showed that the deceased had at some time in his life before sustaining the hernia suffered from tuberculosis, it had become quiescent and caused him no disability until the hernia operation lighted up the old condition and caused the death.⁷⁷

74. *Van Dalsem v. Di Frore & Pac. Coast Casualty Co.*, 1 Cal. Ind. Acc. Com. (part 2) 229; *Johnson v. Lowe*, 2 Cal. Ind. Acc. Com. 543; *Ash v. Barker*, 2 Cal. Ind. Acc. Com. 40; *Telford v. Healy—Tibbetts Const. Co.*, 3 Cal. Ind. Acc. Com. 41; *Hatch v. I. Newman & Sons*, 1 Conn. Comp. Dec. 65; *Jones v. Fidelity & Deposit Co.*, 2 Mass. Ind. Acc. Bd. 301.

75. See aggravation of pre-existing condition. *Hills v. Oval Wood Dish Co.*, 191 Mich. 411, 158 N. W. 214, and *Borgsted v. Shults Bread Co.*, 180 App. Div. 229, 167 N. Y. S. 647, 1 W. C. L. J. 666.

76. *Selaya v. Ruthven and Cerrana*, 5 Cal. Ind. Acc. Com. 238.

77. *Cox et al. v. California Southern R. R. Co. et al.*, 5 Cal. Ind. Acc. Com. 10.

In another case where the tuberculosis was not discovered until the employee suffered an accidental injury, though the medical testimony was to the effect that the disease was sufficiently advanced to have caused the death in a few days had no injury been sustained, the commission held that the death was not proximately caused by the injury.⁷⁸

"While it may be true that over-exertion in climbing the ladder and closing the valve was the moving cause of decedent's death, yet his death would never have occurred if it had not been for his impaired heart. Under section one of the Act, the burden of proof is upon the plaintiff to show not only that the accident arose out of and in the course of the employment, but in addition that the death of the plaintiff was not the result of pre-existing disease."⁷⁹

"Proximate cause as applied to negligence law has, by definition, included within it the element of reasonable anticipation. Such element is a characteristic of negligence, not of physical causation. As long as it was necessary to a recovery to have a negligent act stand as the cause of an injury, it did no harm to characterize causation in part, at least, in terms of negligence. But when, as under the compensation act, no act of negligence is required in order to recover, the element of negligence, namely, reasonable anticipation contained in the term 'proximate cause,' must be eliminated therefrom, and the phrase where the injury is proximately caused by accident,' used in the statute, must be held to mean caused in a physical sense, by a chain of causation, which, both as to time, place and effect, is so closely related to the accident that the injury can be said to be proximately caused thereby. To incorporate into the phrase 'proximately caused by accident' all the conceptions of proximate cause in the law of negligence would be to lug in at one door what the legislature industriously put out at another. Proximate cause, under the law of negligence, always has to be traced back to the conduct of a responsible, human agency; under the compensation act the words 'Proximately caused by accident' in terms relate to a physical fact only; namely, an accident. Hence if the injury or death can be traced by

78. *Scott v. Birch Oil Co. et al.*, 5 Cal. Ind. Acc. Com. 197.

79. *Rusch v. Louisville Water Co.*, 2 Ky. L. Dec. 152, (Jan. 1919).

physical causation not too remote in time or place to the accident, then such injury or death was proximately caused by the accident, irrespective of any element of reasonable anticipation."⁸⁰

It has been held that the accidental injury need not be the sole cause of his death, in order to entitle his dependents to compensation but it is sufficient if it be a concurring cause.^{80a}

§ 235. **Quarantine.**—Time lost because of quarantine for a disease of a fellow employee is not compensable under the Federal Act.⁸¹

§ 236. **Rash.**—In a New Jersey case, where an employee had worked in a bleachery for ten days when he was affected with a rash, pronounced to be a condition of eczema which might have resulted from the acids used in the bleachery, the court said: "The English courts seem at last to have settled that where no specific time or occasion can be fixed upon as the time when the alleged accident happened, there is no 'injury by accident' within the meaning of the act. This seems a sensible working rule, especially in view of the provisions of the statute requiring notice in certain cases within fourteen days of the occurrence of the injury, a provision which must point to a specific time."⁸²

§ 237. **Recurrence of Condition Due to Former Injury.**—Where a physician furnished by the employer discharged an employee as cured, but the disability had not fully terminated and the employee had to seek further treatment from his own physician, compensation for the additional surgical services was allowed.⁸³

80. *Milwaukee v. Industrial Commission*, 160 Wis. 238, 151 N. W. 247; *Frint Motor Car Co. v. Industrial Comm.*, 1618 Wis. 436, 170 N. W. 285. 3 W. C. L. J. 399. See *Blood Poison*.

80a. *Miami Coal Co. v. Luce* — Ind. App.—, 131 N. E. 824, (1921).

81. *In Re J. P. B. Frederickson & Others*, 2nd A. R. U. S. C. C. 222.

82. *Liondale Bleach, Dye & Paint Works v. Riker*, 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713.

83. *Douglas v. J. & J. Drug Co.*, 2 Cal. Ind. Acc. Com. 164 (1915), 11 N. C. C. A. 761.

Where an employee, who suffered from a dislocation of the shoulder, was discharged in two weeks by the physician as cured, and at once sustained another dislocation of the same shoulder while bathing, compensation was allowed for the disability arising from the second injury, for the reason that the second physical lapse was directly caused by and was an incident of the previous injury.⁸⁴

Where an employee seeks a recovery for a recurrence of his disability, he must show that his condition has changed from that which it was when the award was made for the first injury, otherwise the original award, in the absence of a distinct recurrence of disability, other than the one for which the first award was made, is final, and the petition must be dismissed.⁸⁵

Where an employee seeks compensation for a recurrence of an injury, the changes occurring in his condition since the former hearing, on which was based the award of the arbitrators, is all that may be shown, and it is error to show any condition existing previous to the first award.⁸⁶

Where splints were removed too quickly from a fractured collar bone and the bone came apart again, but there was no accident, it was held that this extension of the disability was merely a continuation of that due to the earlier accident, and compensation was allowed.⁸⁷

Where an employee, who broke his leg, suffered a refracture while putting on his trousers, and later suffered a further fracture through a fall on the sidewalk, it was held that the evidence was sufficient to sustain a finding that the fall and further injury were due to the original injury, and compensation was allowed.⁸⁸

84. *Kordellos v. N. W. Pac. R. Co.*, 1 Cal. Ind. A. C. 586 (1914), 11 N. C. C. A. 762; *In Re Ennis B. Helton*, 3rd A. R. U. S. C. C. 111.

85. *Bloomington D. & C. R. Co. v. Indus. Bd. of Ill.*, 275 Ill. 120, 114 N. E. 511, 15 N. C. C. A. 391; *Simpson Construction Co. v. Indus. Bd.*, 275 Ill. 366, 114 N. E. 138, 15 N. C. C. A. 391.

86. *Casparis Stone Co. v. Indus. Bd. of Ill.*, 278 Ill. 77, 115 N. E. 822, 15 N. C. C. A. 390; *Cook v. Chas. Hoertz Sons*, — Mich. —, 164 N. W. 64, A. 1 W. C. L. J. 888.

87. *Stormont v. Bakersfield Laundry Co.*, 1 Cal. I. A. C. (part 2) 533.

88. *Bailey v. Indus. Comm.*, 286 Ill. 623, 122 N. E. 107.

Applicant was injured by having his foot caught between a belt and a pulley, resulting in a fracture of his left leg, and upon the advice of the attending physician he returned to work before the injury had entirely healed, and on his way home from work he rebroke his leg. It was held that there was really not a second accident but that the rebreaking of the leg was a direct result of the original accident. Compensation was continued.⁸⁹

An employee received an injury by which the neck of the femur was broken, six months later, while exercising his leg by walking, as directed by his physician, he slipped and refractured the bone. The bones never united after the second accident, and an operation had to be performed. The operation seemed to be a success, but his stomach filled with gas a few hours thereafter, his heart collapsed, and he died. The industrial accident commission awarded a death benefit, and, affirming the award, the court said: "The undisputed facts are as above stated; and, it appearing therefrom that Fleming (deceased) at the time of the second injury was obeying his doctor's instructions to exercise his leg, that he fell and that the fibrous connection which had been established was torn loose at the point of the previous fracture, are circumstances which seem to us to be conclusive to the effect that this second injury arose from a condition produced by the first injury."⁹⁰

Where an employee had sustained a broken arm and dislocated wrist while cranking an automobile, the bones had knit well and he was making a satisfactory recovery, but while taking an automobile trip the partly knit bones slipped or shifted, prolonging disability, the court denied further compensation, holding that the commission had no power to grant further compensation, and could not be given such power unless the subsequent injury was the natural and proximate result of the first injury.⁹¹

89. *Reiss v. Northway Motor & Mfg. Co.*, 201 Mich. 90, 166 N. W. 840, 1 W. C. L. J. 1008, 16 N. C. C. A. 550.

90. *Shell Co. of California v. Industrial Acc. Commission*, 36 Cal. App. 463, 172 Pac. 611 (1918), 2 W. C. L. J. 34; *Squire Dingee Co. v. Indus. Bd. of Ill.*, 281 Ill. 359, 117 N. E. 1031, 15 N. C. C. A. 400; *In Re Roman Mamps*, 2nd A. R. U. S. C. C. 244.

91. *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24, 16 N. C. C. A. 554.

Where an employee sustained a spiral fracture of the leg, and returned to work before he had completely recovered from the injury, and sustained a second injury, in allowing compensation for the prolonged disability due to the second fracture, the court said that a subsequent accident resulting in "further disability," where not the result of lack of ordinary care of the injured employee, may be regarded as a part of the proximate consequences of the original accident.⁹²

Where a displacement of a semilunar cartilage of the knee, which had been cured by an operation, recurred without the intervention of an accident, and which is likely to happen at any time, cannot be said to result from an accident arising out of the employment.⁹³

Where an employee suffered the loss of one leg and, as a result of this loss, his other leg became infected and he lost the use of the other leg, it was held that the loss of the second leg was due to an accident.⁹⁴

§ 238. **Rheumatism.**—A workman in a blacksmith shop pinched his finger, and an infection resulted necessitating four operations. Four days after he left the hospital he was found to be suffering from acute inflammatory rheumatism, which caused his death. Medical testimony was conflicting as to whether the rheumatism was caused by the injury. The board found that there was sufficient evidence to hold that death did result from the injury and awarded compensation.⁹⁵

A miner was compelled to stand in water up to his chest while baling out water in a mine, in consequence of a breakdown of a pump. He contracted subacute rheumatism as a result of the exposure. The lower court found that the applicant had been disabled by an injury caused by an accident. On appeal to the

92. *Head Drilling Co. v. Indus. Acc. Com.*, 170 Pac. 157, 177 Cal. 194, 16 N. C. C. A. 550, 1 W. C. L. J. 470.

93. *Giamopolini-Lombardi Co. v. Raggio*, (1916) 3 Cal. I. A. C. 324.

94. *Saddlemire v. Amer. Bridge Co.*, — Conn. —, (1920), 110 Atl. 63, 6 W. C. L. J. 130.

95. *Perdew v. Nufer Cedar Co.*, 201 Mich. 520, 167 N. W. 868, 2 W. C. L. J. 313, 17 N. C. C. A. 884.

House of Lords the judgment was affirmed, Viscount Haldane saying: "Had he (applicant) died suddenly while so exposed, say, of heart disease, there can be no doubt that this would have given a title to his dependents to claim on the footing of injury from accident. I am unable to see why a claim in respect of a less serious mishap should be excluded by the circumstance that the miscalculated action of entering the water took time to produce its consequences. This miscalculated action of entering the water in the present case must be taken to have constituted a definite event which culminated in rheumatic affection. It was the miscalculation which imported into that event the character of an accident within the meaning of the act."⁹⁶

Where a strain in the course of the employment together with a pre-existing rheumatic condition produces disability, compensation will be allowed.⁹⁷

Where the continuous use of muscles required by claimant's work was a contributing cause of his disability, which was also due to a pre-existing rheumatic condition, and to getting wet in a storm, and his work was not of a kind to have injured one performing it, requiring no more exertion than ordinary duties, it was held that his incapacity was not due to any injury arising from the employment.⁹⁸

Further compensation was denied, where an employee had suffered an accidental injury and was also suffering from rheumatism. The present disability was found not to have been caused by the accidental injury.⁹⁹

Where an employee dropped a heavy weight upon his foot, and later gangrene and rheumatism resulted, it was held that the disability was due to the accidental injury.¹

96. *Glasgow Coal Co. Ltd. v. Welsh*, (1916), W. C. & Ins. Rep. 79, aff'g (1915), W. C. & Ins. Rep. 463, 2 Sc. L. T. 123, N. C. C. A. 690; *In re C. F. Garner*, 3rd A. R. U. S. C. C. 139.

97. *In Re Wm. D. Bowker*, 2nd A. R. U. S. C. C. 138; *In Re John H. Spillane*, 2nd A. R. U. S. C. C. 138.

98. *Petersen v. Sperry & Barnes*, 1 Conn. Comp. Dec. 370.

99. *Worden v. Employers Liab. Assur. Corp.*, 1 Mass. I. A. Bd. 153.

1. *Stinton v. Brandon Gas Co.*, 5 B. W. C. C. 426.

Inflammatory rheumatism or rheumatic fever being an infectious disease is not caused by exposure to extreme climatic changes from heat to cold and cannot under the evidence submitted be said to be due to a personal injury, and therefore not compensable under the Federal Act.²

For want of evidence that rheumatism was caused by exposure or personal injury compensation under the Federal Act was denied.³

§ 239. **St. Vitus Dance.**—An employee developed St. Vitus dance subsequent to a blow received upon the head. Medical experts were of the opinion that this was a sufficient shock to cause St. Vitus dance, and it was held to be a personal injury.⁴

A woman employee fainted, when the cry of fire was given in a factory, and remained unconscious for two hours, and thereafter suffered from chorea or St. Vitus dance. An award of compensation was unanimously affirmed.⁵

§ 240. **Sarcoma.**—Where a workman, while exerting great pressure on a bar, slipped and fell, sustaining an injury which later developed into sarcoma, causing death, compensation was allowed on the ground that the death was due to the accidental injury.⁶

An employee experienced a sharp pain in the left side over the region of the kidney while he was lifting a heavy stone, and upon examination he was found to be suffering from hypertrophied kidney. An operation revealed a sarcoma or tumor of the left kidney, which had been developing for some time previous. The operation failed to restore the patient's health, and he died a few weeks later. It was held that death was caused by sarcoma

2. In Re Lewis D. Davis, 2nd A. R. U. S. C. C. 194.

3. In Re Chas. J. Gibson, 2nd A. R. U. S. C. C. 194.

4. *Christofore v. Employer's Liab. Assn. Corp.*, 2 Mass. I. A. Bd. 364.

5. *London v. Casino Waist Co.*, 181 App. Div. N. Y. 962, Special N. Y. Bull. for August 1916—May 1918, pg. 213.

6. *Ondeck v. The Edward Balf Co.*, 2 Conn. C. D. 308; In Re John Bengston, 3rd A. R. U. S. C. C. 140; In Re Andrew Nachtman, 3rd A. R. U. S. C. C. 141.

of the kidney which could not have been caused by lifting a stone. The only relationship shown to have existed between deceased's act of lifting the stone and the disease is that deceased's attention was called to the diseased kidney by the pain experienced at the time of the act mentioned, and the death was not due to the injury.⁷

An employee suffered a strain in the groin and a sarcoma developed, which was removed by operation. Medical testimony denied the probability of a sarcoma being caused in this way. It was held that the sarcoma had existed prior to the injury, and the accident only served to call the attention of the employe to it. Compensation was denied.⁸

§ 241. **Scarlet Fever.**—Where an injured employee, while in the hospital, contracted scarlet fever, which aggravated his injury the prolonged disability caused thereby, was held to be the result of the accident.⁹

It appeared that the applicant was a porter in an infectious disease hospital and was employed in the wards, and also to clean out the mortuary. He contracted scarlet fever, and claimed compensation under the Workmen's Compensation Act of 1906. It was held, by the Court of Appeal, that, though it was very probable that he had caught the fever in the hospital, and even on a particular occasion of cleaning out the mortuary, yet there was no evidence definitely to establish these facts; and that in any event the contracting of the disease could not, under the circumstances, be called an "accident" within the meaning of sub-section 1 of section 1 of the Act.¹⁰

Where, after an operation for hernia a workman took scarlet fever, and died, while still in the hospital, and the attending physician certified that his death was due to the fever, it was

7. In Re Czwick, (No. 127812) Bull. of I. C. of Ohio Vol. 4, pg. 108.

8. Monsoulls v. London Guar. & Acc. Co., 1 Mass. I. A. Bd. 154; In Re Wm. F. Woods, 3rd A. R. U. S. C. C. 141.

9. Brown v. Kent Ltd. (1913), W. C. Ins. Rep. 639, 6 N. C. C. A. 626.

10. Martin v. Manchester Corp., 5 B. W. C. C. 259, 106 Law Times Rep. 741, 28 Times Law Rep. 344, 3 N. C. C. A. 238.

held that the death did not result from the injury, and compensation for the death was denied.¹¹

§ 242. **Sciatica.**—A workman was alternatively exposed to heat and cold, and as a result of such exposure he contracted sciatic rheumatism. Compensation was denied because of the absence of an accident. Affirming the judgment, the court held that, as there was no violence to the physical structure of plaintiff's body there was no "accident," within the meaning of the compensation act, that: "The case is in no wise different than the ordinary case where a man who has been engaged in indoor work for a time does outdoor work in cold weather and contracts a severe cold."¹²

A boatman, acting as an unlicensed pilot jumped to his own boat, after his duties were performed on the boat he was piloting, and in landing in the boat he nearly upset it, and water filled the boat. Later he developed sciatica, which incapacitated him. This was held to be an accidental injury.¹³

On March 13, an employee was assisting in loading 4 by 6 timbers on trucks, when he either slipped or in some manner wrenched his back and fell down and was unable to move. He was confined to his home under a doctor's care until August 10th. He testified that he worked until August 26th when the "sciatica" came back. The court held that the employee suffered a compensable accidental injury.¹⁴

§ 243. **Septicæmia.**—Where bloodpoisoning results from the intentional use of a hypodermic needle, and it is shown that the contents of the needle was of such a nature as not to cause the infection, but that the germ must have come from the exterior of the needle, it has been held that this was an accident.¹⁵

11. *Corcoran v. Farrell Foundry & Machine Co.*, 1 Conn. Comp. Dec. 42.

12. *Blair v. Omaha Ice and Cold Storage Co.*, 102 Neb. 16, 165 N. W. 893, 15 N. C. C. A. 694, 1 W. C. L. J. 424.

13. *Barbeary v. Chugg*, (1915), 8 B. W. C. C. 37.

14. *Southwestern Surety Ins. Co. v. Pillsbury*, 172 Cal. 768, 158 Pac. 762, 14 N. C. C. A. 538.

15. *Bailey v. Interstate Cas. Co.*, 8 App. Div. 127, 40 N. Y. Supp. 513,

An employee had died of septicæmia following an injury to his finger, compensation was denied because of lack of evidence to show that the injury to his finger was the result of an accident.¹⁶

Where a miner received an injury to his foot, caused by a heavy fall of coal, and later died from tetanus. The county court judge held that the death resulted from the accident. On appeal it was held that there was evidence to support this finding.¹⁷

Although there is a diseased condition existing before an injury, and the injury would not cause death but for the pre-existing condition, still if septicæmia ensues naturally, actually and unavoidably from the injuries, the disability is compensable.¹⁸

A workman sustained an injury to his ribs and side in a fall down a stairs. After his discharge from the hospital, he was compelled to return to the hospital, where he died from general septicæmia, which was held, on conflicting evidence, to be the result of the accident, and compensation was awarded.¹⁹

A workman received a wound in the hand on April 17, and erysipelas developed on the face on July 7th, following. It was held that there was no evidence to justify a finding of accidental injury.²⁰

A workman crushed his index finger, which resulted in streptococcus infection, necessitating an amputation of the finger. Later this infection spread over his body and to his leg. It was held that this continued disability resulted from the original injury.²¹

Compensation was denied for the death of a miner from blood-poison, claimed to have resulted from an abrasion received during a fall of stone in the mine. Medical evidence showed that the time

Aff'd 158 N. Y. 723, 53 N. E. 1123; *Marchi v. Aetna Life Ins. Co.*, 205 N. Y. 606.

16. *Peoria Cordage Co. v. Indus. Bd.*, 284 Ill. 90, 119 N. E. 996.

17. *Rist v. Larkin & Sangster*, 171 App. Div. 71, 156 N. Y. Supp. 875; *Stapleton v. Dinnington Main Coal Co.*, (1912), 5 B. W. C. C. 602; *Walker v. Mullins*, 42 Irish L. T. 168, 1 B. W. C. C. 211.

18. *Mazzarisi v. Ward*, 170 App. Div. 868, 156 N. Y. Supp. 964.

19. *Dependents of Chas. Biero v. New Haven Hotel Co.*, 1 Conn. C. D. 52.

20. *Hugo v. Larkins and Co.*, 3 B. W. C. C. 228.

21. *Batch v. Borough of Broton*, 1 Conn. C. Com. 177.

between the fall of stone and the discovery of the infected condition was entirely too brief, and the board held that there was no evidence that the blood poisoning was the result of an injury.²²

Where one sustains an injury while working in the ordinary way, with the customary materials and appliances, the injury cannot be said to be the result of an accident. It was so held where an engine fitter had a blister on his finger, and in consequence of using red lead the finger became poisoned.²³

Where a railroad engineer cut his finger at home and blood-poison supervened, necessitating the amputation of the finger, it was held that the injury was not the result of an accident.²⁴

Where an employee was thrown from a wagon and later general septicæmia followed and death resulted, it was held that the death was due to the personal injury.²⁵

A workman, who was engaged in moving rails, backed into a prop and injured his thigh. He continued work until forced to quit because of pain. Upon consulting a physician it was determined that he was suffering from osteomyelitis and septicæmia, and an operation was performed, from the effect of which the patient died. Medical testimony was to the effect that a blow might cause osteomyelitis. It was held that the death was caused by an accident.²⁶

§ 244. **Skin Affections.**—Claimant sought compensation for skin eruption, the cause of which was unknown. The claim was disallowed, in the absence of evidence to establish that it resulted from an accident in the course of employment.²⁷

22. *Jenkins v. Standard Colliery Co.*, (1911), 5 B. W. C. C. 71, 11 N. C. C. A. 509.

23. *Walker v. Lilleshall Coal Co.*, (1900), 81 L. T. 769, 2 W. C. C. 7.

24. *Chandler v. G. W. R. Co.*, (1912), 5 B. W. C. C. 254.

25. *Silva v. Travelers Ins. Co.*, 2 Mass. I. A. Bd. 597. See infection, Blood Poisoning; Friction injuries, Anthrax; Gangrene and erysipelas.

las.

26. *Mills v. Dinnington Main Coal Co., Ltd.*, 1917, W. C. & Ins. Rep. 11, 17 N. C. C. A. 94.

27. *In re Drews*, Ohio I. C. No. 92709, July 1, 1915, 11 N. C. C. A. 500.

Where an employee was removing an old water closet, and suffered poisoning of his face and hands, due to contact with harmful substances, compensation was allowed for the disability.²⁸

An employee, working, in a bleachery, was affected with a rash, which was pronounced to be a condition of eczema which might be due to the acids. It was found that the condition resulted from coming in contact with moistened clothes, and not an accident within the meaning of the New Jersey Act.²⁹

An employee in a hotel was afflicted with a disease making his skin abnormally sensitive, and while washing dishes in a tank containing hot water, soap and caustic soda his hands became greatly inflamed. Later his nails came off, and he was disabled for about four and a half months. Compensation was allowed for the injury resulting from the accident.³⁰

An employee, who neglected to use the proper gloves, suffered from dermatitis, brought on by washing inkstands with a solution of caustic soda. This was held not to be an accident.³¹

Where a workman's hands became bruised and poisoned from handling rough tanbark, compensation was awarded, although no specific time could be assigned to the happening of the accident.³²

Where a leather cleanser caused an acute inflammation of the skin and blisters, which left the hands raw and sore, and which could not be prevented by the use of gloves, it was held that this was such an injury as entitled the employee to compensation.³³

§ 245. **Sleep.**—The facts in this case, as stated by the court in its syllabus, are as follows: "On August 15, 1916, the husband of the petitioner was a farm hand; whose particular employment on that day was to make a trip to Philadelphia with a truck

28. *Re F. J. Courboyer*, Op. Sol. C. & L. 582.

29. *Liondale Bleach, Dye and Paint Works v. Riker*, 85 N. J. T. 426, 89 Atl. 929, 4 N. C. C. A. 713; Rev'g. 36 N. J. L. J. 305.

30. *Dotzaur v. Strand Palace Hotel*, (1910), 3 B. W. C. C. 387.

31. *Cheek v. Hamsworth Bros.* (1901), 4 W. C. C. 3.

32. *Seward v. Sunset Trading and Land Co.*, 3 Cal. I. A. C. 49.

33. *Boris v. Frankfort Gen. Ins. Co.*, 1 Mass. I. A. C. Bd., 276, for additional cases, see *Dermatitis and Eczema*.

wagon drawn by a team of mules. He left the farm between 5 and 6 o'clock in the afternoon, and at 2 o'clock the next morning was found dead sitting on the seat of the truck with his body crushed between the seat and the over hanging roof of a shed under which the mules were standing." "The court was justified in finding that the injury of which the decedent died was not intentionally self-inflicted or the result of intoxication. This left two hypotheses upon which to account for the manner in which such injury was caused, viz., that the decedent was asleep when the mules went under the low roof, or that he was negligent if he was awake. The latter hypothesis need not be considered, inasmuch as negligence is no bar to a recovery of compensation. "The main contention is that the injury was not accidental if the decedent was asleep; the argument being that sleep is not an accident. The act of going to sleep may or may not be an accident, depending upon whether or not it was designed; but the failure to wake up in time to avert a catastrophe is an accident in every sense of the word. If the going to sleep was not designed, it was accidental; if it was designed it was negligence. In any event, the undesigned failure of the deceased to wake up until he was crushed between the seat and the low roof was purely 'accidental' in the sense in which that term is constantly and correctly employed. Falling out of bed asleep is an accident, even if the sole design in going to bed was to go to sleep. The sole case in which falling asleep is clearly not within an employment is that of a watchman or similar service, where the servant is employed expressly to stay awake. In such case the failure of the servant to do the one thing he was specially employed to do is, in effect, an abandonment of his employment. Such seems to have been the recent case. *Gifford v. Patterson*, 222 N. Y. 4 (15 N. C. C. A. 263), 117 N. E. 946." It was held that deceased came to his death by an accident arising out of the employment³⁴

34. *Dixon v. Andrews*, 91 N. J. L. 973, 103 Atl 410, 16 N. C. C. A. 894. 2 W. C. L. J. 105.

§ 246. **Source of Necessary Fact.**—A workman's hand became cracked from exposure to wet and cold weather. He worked several days when the cracks began to open and bleed, with the result that his hand had to be bound up, and while in this condition it became infected. The trial judge denied compensation because he could not determine whether the infection resulted from the employment, the atmosphere or other source. The appellate court, in reversing this decision, stated that: "The result is this—that the man's incapacity to work, his poisoned hand, results from the injury, from the crack opening and becoming poisoned."³⁵

The employee was engaged in sacking bone fertilizer. An infection resulted from a slight scratch on the leg, through there was no proof as to how this was sustained. Streptococci germs are found in large numbers in bone dust, also to a lesser degree in decaying matter, dust, etc. The court held that disease could not be said to be an accident if it could not be shown to have been contracted at a particular time and at a particular place by a particular accident.³⁶

§ 247. **Sprains and Strains.**—A muscular spasm caused by straining the muscles of the side while attempting to lift a heavy cement block, is an accident.³⁷

Where an employee ruptured a blood vessel in his lungs while lifting heavy cans of paint, it was held that the injury resulted from accident.³⁸

An employee suffered two accidents, one when he fell into an excavation, sustaining an aneurism of the aorta and heart irregularity, and another when he fell dead, while doing some heavy lifting. The trial judge held that the strain from heavy lifting

35. *Saddington v. Inslip Iron Co., Ltd.*, (1918). W. C. & Ins. Rep. 46.

36. *Grant v. G. & G. Kynoch*, (1918), W. C. & Ins. Rep. 117.

37. *Bystrom v. Jacobson*, 162 Wis. 180, 155 N. W. 919, 14 N. C. C. A. 528; *Vernon v. A. E. Keyes*, 1 Cal. I. A. C. Part II. 526.

38. *Southwestern Surety Ins. Co. v. Owens*, — Tex. Civ. App., —, 198 S. W. 662, 15 N. C. C. A. 524.

in his diseased condition, brought about by the fall, caused his death, and compensation was awarded.³⁹

Where a stone mason sustained a rupture of a blood vessel as the result of strenuous exertions in cutting stone, and died from its effects, it was held that deceased came to his death as the result of an accident.⁴⁰

Where an employee suffered a strain while lifting a heavy barrel, which strain caused a stroke of apoplexy, it was held that the injury sustained was an accidental injury.⁴¹

Where an employee endeavored to move heavy "I" beams and suffered a strain, causing hemorrhage, it was held that he had sustained an accidental injury, and compensation was allowed.⁴²

Where a man, while piling lumber, slipped and wrenched his back, it was held that he had sustained an accidental injury.⁴³

Where a woman aggravated a weak heart condition by over-exertion in pulling carpet thus incapacitating herself for work, it was held that her incapacity resulted from an accidental injury.⁴⁴

Where a workman ruptured his spinal cord as a result of exertion in pushing a wheelbarrow, and died later from the in-

39. *Winter v. Frazelle Co.*, 88 N. J. L. 401, 96 Atl. 360, 11 N. C. C. A. 180.

40. *State ex rel. Simmers et al. v. District Court of Stearns County*, 137 Minn. 318, 163 N. W. 667, 14 N. C. C. A. 527; *Fenton v. Thorley*, 1903, 19 L. T. R. 684, 5 W. C. C. 1.

41. *Fowler v. Risedorph Bottling Co.*, 175 N. Y. App. Div. 224, 161 N. Y. Supp. 535, 14 N. C. C. A. 536; *Duffy v. Town of Brookline*, — Mass. —, 115 N. E. 248, 14 N. C. C. A. 537.

42. *Manning v. Pomerene*, 101 Neb. 127, 162 N. W. 492, 14 N. C. C. A. 537; *Schmidt v. O. K. Baking Co.*, 1 Conn. Comp. Cas., 683, 14 N. C. C. A. 539.

43. *Southwestern Surety Co. v. Pillsbury*, 172 Cal. 768; 158 Pac. 762, 14 N. C. C. A. 537, :

44. *In re Madden*, 222 Mass. 487, 111 N. E. 379, 14 N. C. C. A. 538; *Uhl v. Guarantee Const. Co.*, 174 N. Y. App. Div. 571, 161 N. Y. Supp. 659, 14 N. C. C. A. 546. See aggravation of pre-existing condition. *Broleski v. Nickols Copper Co.*, 171 N. Y. App. 959, 155 N. Y. Supp. 14 N. C. C. A. 547.

jury, the court held that his death was due to an accidental injury.⁴⁵

Where an employee suffered a strain in the course of his employment and later died of miliary tuberculosis, but medical evidence was to the effect that the conditions following an injury that are necessary to cause the tubercular germ to become active were not present and in no case could a strain cause the germs to become active, the court held that there was no evidence tending in any way to connect the employee's diseased condition or his subsequent death with the injury.⁴⁶

A workman's duties consisted of lifting a heavy iron bar many times during the day, and while he was lifting the bar he felt a snap which developed into a hernia. In denying compensation, the court said: "In the case at bar it conclusively appears from claimant's own testimony that he received no accidental injury. He was engaged at the moment of his injury in his usual and ordinary employment and in the usual and ordinary way. In the course of such employment it was his duty to lift the iron bar once in about every 15 minutes, about 90 or 100 times a day. We are of opinion that an employee who receives an injury in the nature of a hernia, while engaged in his usual and ordinary employment, without the intervention of any untoward or accidental happening, is not within the provisions of the compensation act, which, as we have held, provides compensation for accidental injury only."⁴⁷

A workman, while lifting a heavy weight, suffered a strain, which caused dilation of the heart muscle, and resulted in acute

45. *State ex rel. Puhlman v. District Court Brown Co.*, 137 Minn. 30, 162 N. W. 678, 14 N. C. C. A. 545; *Sinclair v. Ramapo Iron Wks.*, 4 N. Y. St. Rep. 415. *In re Harry W. Truitt*, 2nd A. R. U. S. C. C. 132; *In re Alpheus Bigelow*, 2nd A. R. U. S. C. C. 132.

46. *Albaugh-Dover Co. v. Industrial Board of Ill.*, 278 Ill. 179, 115 N. E. 834, 14 N. C. C. A. 545. *In re Martin J. Cardwell*, 2nd, A. R. U. S. C. C. 135.

47. *Kutschmar v. Briggs Mfg. Co.*, 197 Mich. 146, 163 N. W. 933, 15 N. C. C. A. 524.

cardiac dilation causing death. The court held that the death was due to the accidental injury.⁴⁸

Pneumonia, resulting from an injury sustained from lifting a heavy object, was held, on conflicting evidence by experts, to be due to the accidental injury.⁴⁹

Where a continuous strain brings about a cardiac breakdown, it cannot be said that the disability or death was due to an accident.⁵⁰

Compensation was denied to applicant, who claimed that he suffered from a strain while lifting, causing a varicocele, because medical testimony denied the probability of varicocele resulting from an injury, it being a gradual development.⁵¹

Falling of the womb, causing by a strain, sustained while carrying buckets of starch in a laundry, has been held to be an accidental injury.⁵²

A workman mowing around a field, sought to straighten some down grain, and strained his leg, whereby he tore muscles and ruptured fibers. This was held to be a personal injury by accident.⁵³

Rupture caused by overexertion in the course of a man's work, is an accident.⁵⁴

48. *In re Gibbons*, 181 N. Y. App. Div. 142, 168 N. Y. Supp. 412, 15 N. C. C. A. 525, 1 W. C. L. J. 697; *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507, 14 N. C. C. A. 427; *Flaherty v. Locomobile Co. of America*, 1 Conn. C. D. 354; *In re Powers*, Op. Sol. Dept. Labor 214.

49. *Bayne v. Riverside Storage & Cartage Co.*, 181 Mich. 378; 148 N. W. 412; 5 N. C. C. A. 837.

50. *Coe v. Fife Coal Co.* (1909), S. C. 393, 46 Sc. L. R. A. 325, 8 N. C. C. 102; *Black v. New Zealand Shipping Co.*, 6 B. W. C. C. 720, 1913 W. C. & Ins. Rep. 480, 8 N. C. C. A. 102; *Ritchie v. Kerr*, 1913, S. S. 613, Sc. L. R. 434; 6 B. W. C. C. 419, W. C. & Ins. Rep. 297.

51. *Holden v. Maryland Casualty Co.*, 1 Cal. I. A. C. D. No. 1, (1914), 11, 6 N. C. C. A. 399; *Marshall v. Shepherd*, 6 B. W. C. C. 571.

52. *Loustalet v. Metropolitan Laundry Co.*, 1 Cal. I. A. C. Dec. (1914) 318, 10 N. C. C. A. 771.

53. *Purse v. Hayward*, (1908), C. C., 125 L. T. J. 10, 1 B. W. C. C. 216,

54. *Fenton v. J. Thoreley & Co.*, (1903) 5 W. C. C. 1; *Stewart v. Wilsons & Clyde Co.*, (1903), 5 Falc. 120 (Scotch); *United States Mutual Accident Ins. Ass'n. v. Barry*, 131 U. S. 100, 33 L. Ed. 60; *North American Life & Accident Ins. Co. v. Burroughs*, 69 Penn. 43.

Where a scrubwoman slipped and fell on a slippery floor, and sustained a sprain, compensation was allowed for the injury.⁵⁵

Where a condition of arterial sclerosis was aggravated by reason of a continued strain, causing disability, it was held that this was an injury.⁵⁶

A workman claimed to have ruptured a blood vessel while assisting in lifting the end of one of the dump wagons used in the employment. Later he died from hemorrhages. On conflicting evidence, it was held that the evidence failed to sustain the contention that the rupture was caused by an accident.⁵⁷

A workman, while lifting a heavy beam, suddenly tore several fibres of the muscles of his back. It was held that this was a compensable accident.⁵⁸

Where an employee died from mitral regurgitation immediately after lifting a metal cover weighing 150 lbs., being assisted by two other workmen, the strain of the lifting was not unusual or fortuitous, and therefore not an accident, when two men had just previously lifted the same cover and the employee had himself been doing the same work for several days.⁵⁹

Where a workman suffered a strain while lifting terra cotta window sills, which strain caused a strangulated right oblique inguinal hernia, necessitating an operation from which the patient died, compensation was allowed, even against the contention that deceased suffered from a disease or from a congenital defect, the development of which is not an accidental injury.⁶⁰

55. *Welsh v. American Mutual Liability Ins. Co.*, 1 Mass. Ind. A. Bd. 119.

56. *Homan v. Frankfort Gen. Ins. Co.*, 2 Mass. Ind. A. Bd. 775.

57. *Englebreton et al. v. Ind. Acc. Com.*, 170 Cal. 793, 151 Pac. 421, 10 N. C. C. A. 545.

58. *Boardman v. Scott & Whitworth*, (1901), 3 W. C. C. 33, 85 L. T. 502, 4 W. C. C. 1; *Timmins v. Leeds Forge Co.*, 2 W. C. C. 10; *Stewart v. Wilson & Clyde Coal Co.*, (1902), 5 Sc. Sess. Cas. 5th Series Scot. 126; *Fidele v. Erie R. R. Co.*, (1916), 8 N. Y. St. Dep. Rep. 454.

59. *Guthrie v. Detroit Shipbuilding Co.*, 200 Mich. 355, 167 N. W. 37, 1 W. C. L. J. 1035.

60. *Hurley v. Seldon-Breck Const. Co.*, 193 Mich. 197, 159 N. W. 311, 14 N. C. A. 529. See *Hernia, Fleming v. Robert Gair Co.*, 17, 6 N. Y. App. Div. 23, 162 N. Y. Supp. 298, 14 N. C. C. A. 543; *Grove v.*

§ 248. **Suicide.**—An engine driver suffered an injury to his thumb which became infected and took a long time in healing. He became depressed and suffered from neurasthenia, and later committed suicide by throwing himself in front of a train. Compensation was denied, the court saying that the injury was not the cause of the insanity resulting in suicide.⁶¹

An employer received an injury through a splash of molten lead in his eye. He received hospital treatment, and later became silent and moody, was depressed and suffered from certain marked hallucinations. While in this condition he threw himself from a window in the hospital and was killed. Upon the evidence adduced, it was held that the death was a direct result of the injury, the court stating the following rule with approbation; "This decision rests upon the rule established in *Daniels v. New York N. H. & H. R. Co.*, 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751. That rule applies to cases arising under the Workman's Compensation Act. It is that, where there follows as the direct result of a physical injury an insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy without conscious volition to produce death, having knowledge of the physical consequences of the act,

Michigan Paper Co., 184 Mich. 449, 151 N. W. 554, 6 N. C. C. A. 405; *Eddes v. School District of Winnipeg*, 22 Manitoba 240, 21 W. L. R. 214, 2 W. W. R. 665, 2 Dom. L. R. 696, 14 N. C. C. A. 542; *La Veck v. Park Davis & Co.*, 190 Mich. 604, 151 N. W. 72, 12 N. C. C. A. 325; See aggravation of pre-existing disease, *Scales v. West Norfolk Farmers' Chemical Co.*, 1913 W. C. & Ins. Rep. 165; *Hills v. Oval Wood Dish Co.*, 191 Mich. 411, 158 N. W. 214; *Bell v. Hayes-Ionia Co.*, 192 Mich. 90, 158 N. W. 179, 14 N. C. C. A. 532; See *Hernia*, *Robbins v. Original Gas Engine Co.*, 191 Mich. 122, 157 N. W. 437, 14 N. C. C. A. 530. See *Hernia*, *Brown v. Kemp*, 6 B. W. C. C. 725, 14 N. C. C. A. 535, *Smelik v. Peabody Coal Co.*, Ill. Ind. Bd. July 10, 1914, 6 N. C. C. A. 398; *Fulford v. Northfleet Coal & Ballast Co.*, 1 B. W. C. C. 222, 6 N. C. C. A. 399; In re *Clark & Op. Sol. Dept. Labor*, 188; *Voorhess v. Smith Schoonmaker Co.*, 86 N. J. L. 500, 92 Atl. 280; *Zappala v. Ind. Ins. Com.*, 82 Wash. 314, 114 Pac. 54, L. R. A. 1916A. 295; *Poccardi v. Public Service Comm.*, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299; *Donahue v. R. A. Sherman Sons Co.*, 39 R. I. 373, 98 Atl. 109, 14 N. C. C. A. 547.

61. *Withers v. London, B. & S. Co. Ry.* (1916) W. C. & Ins. Rep. 317, 15 N. C. C. A. 349.

then there is a direct and unbroken causal connection between the physical injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary willful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicidal act, even though choice is dominated and ruled by a disordered mind, then there is a new and independent agency which breaks the chain of causation arising from the injury.⁶²

An employee, who had prior to the date of injury lost one of his eyes, was while at work struck by a splinter in the remaining eye and gradually lost the sight of this eye also, at which time he committed suicide. The widow alleged that in consequence of the injury the deceased received a severe shock and that his nervous system broke down, his mind became affected resulting in insanity during which he committed suicide; the sheriff's substitute dismissed the application as irrelevant. In declaring that the application should not have been dismissed, it was held that the averments should not be as strictly construed as in case of an action at law, and that applicant should be allowed to offer proof of the matter averred, and be afforded an opportunity of establishing the chain of causation between the injury and the death.⁶³

Where a workman's head was injured by a fall, and traumatic neurasthenia developed and gradually grew worse, and about eight months after the accident he was found drowned in a canal, the county court judge found that he committed suicide, due to a diseased mental condition resulting from the accident. On appeal this order was reversed on the ground that there was no evidence to justify such finding.⁶⁴

The decedent received an injury to his hand in the course of his employment, by striking it against a rusty pipe. Infection followed and he was taken to a hospital. Later he escaped from the

62. *In re Sponatski*, 220 Mass. 526, 108 N. E. 466, 8 N. C. C. A. 1025; *Lupfer v. Baldwin Locomotive Works*, —Pa.— (1921), 112 Atl. 458.

63. *Malone v. Cayzer, Irvine & Co.*, 1 B. W. C. C. 27, 1908 S. C. 479, 45 Sc. L. R. 351, 8 N. C. C. A. 1026.

64. *Southal v. Cheshire County News Co.*, 5 B. W. C. C. 251, (1912), W. C. & Ins. Rep. 101, 8 N. C. C. A. 1028.

hospital and was found dead on a railroad track. The sole contention was whether there was any connection between the death and the injury. Medical experts were of the opinion that the injury produced a diseased mental condition, and the absorption of the toxins from the infection caused him to become violent. The board found that there was a causal connection between the injury and the death.⁶⁵

Where a workman, who had suffered an injury to his eye, and committed suicide after the doctor had expressed the thought that he might lose the sight of it, and there was no evidence of insanity, compensation was denied.⁶⁶

Where the body of an employee was found on the pavement under the window of the mill where he worked, and there was no direct evidence of suicide or murder, the presumption against the commission of a crime is sufficient to warrant a finding that the death was due to an accident. "Where the evidence shows deceased to have been in good health and there is a complete absence of evidence showing suicide, it must be presumed that the death was accidental."⁶⁷

§ 249. **Sun Stroke and Heat Stroke.**—Plaintiff's deceased, 57 years of age, suffered a heat stroke in a sheet iron building while the thermometer stood at 86 or 87 degrees. Deceased had been employed there for 7 years. Defendant contended that there had been no physical violence to the deceased's body; that the heat prostration resulting in the death was due to natural causes; that the death did not result from violence or the resultant effect of violence. The court, in affirming the judgment for the plaintiff said: "There would have been no injury if the business had not existed. The heat and humidity, the corrugated sheet iron in

65. *Chisea v. United States Crushed Stone Co.* Ill. Ind. Bd. Oct. 28, 1914, 8 N. C. C. A. 1029.

66. *Grime v. Fletcher* (1915), 1 K. B. (Eng.) 734, 31 Times L. R. 158, 84 L. K. B. N. S. 347, 8 B. W. C. C. 69, (1915), W. N. 43, 59 Sol. Jo. 233.

67. *Sparks Milling Co. v. Indus. Comm.* — Ill. — (1920), 127 N. E. 737, 6 W. C. L. J. 299; *Wilkinson v. Aetna Insurance Co.*, 240 Ill. 205, 88 N. E. 550, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269; *Wiscaless v. Hammond, Standish & Co.*, 201 Mich. 192, 166 N. W. 993

the building, the tarred roof, the poor ventilation, and the dust and particles of matter in the air, all acting together caused the sickness that brought about the death of the decedent. A stronger man might have lived, but it is enough that the industry brought about this man's death. An accident is an event which proceeds from an unknown cause, or is an unusual effect of known cause, and therefore not expected. * * * It is our view that compensation is a charge against the industry because the industry itself is responsible for the injury. As applied to this case it may be fairly assumed that plaintiff's decedent would not have died at the time he did but for the fact that he went to the factory on a hot day and worked in a heated building."⁶⁸

An employee suffered a heat stroke and died an hour thereafter. Two physicians testified that heat stroke is generally regarded as an accident, especially when due to artificial heat, also that it produces pathological changes in the body. On appeal, the court held that the evidence was sufficient to show that an accident had happened to the deceased, such as was contemplated by the compensation act.⁶⁹

In an English case, where the employee died of heat stroke while working as a stoker on a ship on the Red Sea, the court said: "The elements of accident such as suddenness and unexpectedness or miscalculation, all seem to be absent; everything happened as might be expected."⁷⁰

In a Minnesota Case, the court held that sunstroke or heat stroke was an accident, saying: "This was as a violent injury produced by an external power, not natural. * * * The intense heat

68. *Young v. Western Furniture & Mfg. Co.*, 101 Neb. 696, 164 N. W. 712, 15 N. C. C. A. 676; *Zoler v. American Steel & Wire Co.*, Ill. I. Bd. No. 844 (1915), 12 N. C. C. A. 319; *In re Wm. F. Manning*, 2nd A. R. U. S. C. C. 205; *In re Henry Ecker*, 2nd A. R. U. S. C. C. 205; *In re Johann*, 2nd A. R. U. S. C. C. 206.

69. *Kanscheit v. Garrett Laundry Co.*, 101 Neb. 702, 164 N. W. 708, 15 N. C. C. A. 675; *City of Joliet v. Indus. Comm.*, —Ill.— 126 N. E. 618, 5 W. C. L. J. 802.

70. *Pyper v. Manchester Liners, Ltd.*, (1916), W. C. & Ins. Rep. 301, 15 N. C. C. A. 678; *Contra, Maskery v. Lancashire Shipping Co.*, 7 B. W. C. C. 428, 6 N. C. C. A. 708.

of the sun associated with the humidity of the atmosphere emanating from the wet sand as an external cause was a violent agency in the sense that it worked upon decedent so as to cause his injury and death. The conclusion that his death was caused by violent and external means is inevitable. That a death is unnatural imports a violent agency as the cause."⁷¹

In a Michigan case the employee was doing brick work about a boiler. The temperature was 136 degrees, and he was overcome with the heat and went home for a day, after which he returned, was overcome and died. The Industrial Accident Board awarded compensation for his death. In reversing the award on appeal, the court, after remarking that the Michigan Workmen's Compensation Act provided compensation for accidental injuries only, said: "The record is absolutely barren of any evidence that anything untoward or unusual happened in the course of his employment during any of the three days or that he exerted himself in any unusual manner or to an unusual degree. He was doing the work which he and his associates were employed to do exactly in the manner they expected to do it. To permit recovery in this case would make it impossible to deny recovery in any case where a fireman of a stationary or marine boiler in the performance of his ordinary and accustomed labor succumbs to heat prostration."⁷²

In Massachusetts it was held, in the case of an employee working in a pit, that since there was no evidence that the heat in the pit was greater than elsewhere outside and no evidence that the employee was required to work in the pit after he found that the heat was too severe for him, it would reverse the award which the board had made in his favor.⁷³ On a second hearing it was held that the employee suffered an injury arising out of the employment.⁷⁴

71. *State ex rel, Rau v. District Court Ramsey Co.*, 138 Minn. 250, 164 N. W. 916, 15 N. C. C. A. 679, 1 W. C. L. J. 93.

72. *Roach v. Kelsy Wheel Co.*, 200 Mich. 299, 167 N. W. 33 (1918), 17 N. C. C. A. 999, 1 W. C. L. J. 1025.

73. *In re McCarthy*, 230 Mass. 429, 119 N. E. 697 (1918), 16 N. C. C. A. 754.

74. 123 N. E. 87, 4 W. C. L. J. 96.

A brewery wagon driver began work at 7 a. m. At 3 p. m., he alighted from his wagon about 5 miles from the city where he had been working. He walked around apparently suffering from the heat, and in about 10 minutes dropped dead. The death was held to be due to an accidental injury arising in the course of the employment, but not out of it, and compensation was denied.⁷⁵

An employee had been feeling badly for a day or two, apparently on account of the heat, the temperature being 90 degrees and the humidity 82, which was excessive. He was persuaded to stay at his work until 11:40, though he stated he was "all in" and had a "touch of the heat." At 6:30 p. m. he was found dead near his work. Compensation was awarded on the ground of accidental death by sunstroke.⁷⁶

The claimant's deceased husband was overcome by heat while working at the defendant's lunch counter on a hot August day in 1917, and died within two hours. There was nothing to show that the place where the employee was working was hotter than the outside atmosphere, or that he was affected by different heat conditions than prevailed in the community at large. The commissioner, whose language was adopted by the Supreme court of Pennsylvania, said: "The term 'Personal injury' in our act is confined to injuries of accidental origin and such diseases as naturally result therefrom, and must be held to include any form of bodily harm or incapacity (accidentally) caused by (either) external violence or physical force. * * * A stroke by lightning, a stroke from the direct rays of the sun, a heat stroke, or heat prostration, are untoward, unexpected mishaps, and accidental injuries within the meaning of the act. * * * It is immaterial whether the heat prostration is produced by artificial heat, or by the natural heat of the sun, directly or through the heated atmosphere, if the exhaustion comes from heat in the course of employment." The court in this case also quotes from Lord Loreburn, speaking for the House of Lords in *Ismay, Inrie & Co. v. William-*

75. *Campbell v. Clausen-Flannagan Brewery*, 183 N. Y. App. Div. 490, 171 N. Y. Supp. 522 (1918), 17 N. C. C. A. 1001, 2 W. C. L. J. 676.

76. *Hernon v. Holahan*, 182 App. Div. 126, 169, N. Y. Supp. 705 (1918), 1 W. C. L. J. 1120, 17 N. C. C. A. 1002.

son Law Rep. A. C. 1908, 437: "This man died from an accident. What killed him was a heat stroke, coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt, threatened, but generally averted by precaution which experience, in this instance, had not taught. It was an unlooked for mishap in the course of his employment. In common language, it was a case of accidental death."⁷⁷

Under the Pennsylvania Act it is not necessary that the accidental injury should arise "out of the employment" it is compensable if it arises in the course of the employment.

Where a coal hauler was engaged on a very hot day in shoveling coal from a wagon at a place where there was no shade, and was stricken with heat or sunstroke, and later died, he suffered a compensable injury.⁷⁸

While an employee is engaged in stacking bags of cement in a warehouse with an iron roof and which had no windows, he was overcome with heat. The thermometer outside registered 105 degrees in the shade. It was held that he was especially exposed to the danger of heat stroke and suffered an accidental injury.⁷⁹

A bricklayer, employed in a place shut off from prevailing breeze and subjected to reflected heat, collapsed from heat strokes. It was held that predisposition to heat stroke is no bar to compensation, and that the heat stroke was in this case an accidental injury.⁸⁰

Compensation will be allowed for injuries caused by artificial heat used in connection with workmen's employment, as distin-

77. *Lane v. Horn & Hardart Baking Co.*, 261 Pa. 329, 104 Atl. 615, 17 N. C. C. A. 998, 2 W. C. L. J. 928. The Pennsylvania act was amended in 1920 so as to include death from sunstroke. Pa. St. 1320 § 21916; *Matis v. Schaeffer*, — Pa. — 1921, 113 Atl. 64. Death from sunstroke accidental, *Pack v. Prudential Casualty Co.*, 170 Ky. 47, 185 S. W. 496, L. R. A. 1916 E. 952.

78. *Cunningham v. Donovan et al.*, 93 Conn. 313, 105 Atl. 622, 3 W. C. L. J. 584.

79. *Fenslar v. Associated Supply Co.*, 1 Cal. I. A. C. Dec. 447, 12 N. C. C. A. 321; *Lillman v. Sperry Engineering Co.*, 1 Conn. C. D. 408.

80. *McGarva v. Hills*, 1 Conn. Comp. Dec. 533.

guished from natural heat of the sun's rays. Thus, where a workman, engaged in raking out ashes that had fallen from the furnace, suffered from an attack of heat stroke and died as a result thereof, it was held that the death was due to an accident.⁸¹

Where a workman died as a result of heat stroke, and defendant contended that heat strokes and sun stroke were not accidents, the court said: "The word 'accident,' as usually interpreted in compensation statutes, would in most circumstances properly be applied to both mishaps, and injury arising from either may be regarded as having been accidentally received."⁸²

Where other causes contribute to the cause of death, the question as to whether the injury was caused by an accident is one of fact for the judge. It was so held where a fireman's death was caused by cerebral hemorrhage, due to the heat and drinking of excessive quantities of water.⁸³

An engineer suffered from heat stroke while working in an engine room of a steamer, and died later from the effects. The heat was normal for the climate. It was held that death was due to an accidental injury.⁸⁴

An employee in a mine died as a result of heat prostration. The evidence showed that the place where deceased was working was cooler than out in the open, and there was no artificial heat. In denying compensation, the board, in discussing the question, cited a number of cases of injuries resulting from atmospheric conditions, such as frostbites, sunstrokes, lightning, etc., in which the rule was applied which excludes an injury not fairly traceable to the employment as a contributing proximate cause and was a hazard to which the workman would have been exposed apart from his

81. *Ismay, Imre & Co. v. Williamson*, 77 L. J. P. C. 107 (1908), A. C. 437, 1 B. W. C. C. 232, 6 N. C. C. A. 714; *Wajteniak v. Pratt & Cady Co., Inc.* 1 Conn. C. Dec. 545.

82. *Walsh v. River Spinning Co.*, 41 R. I. 490, 103 Atl. 1025, 17 N. C. C. A. 998, 2 W. C. L. J. 689.

83. *Johnson v. S. S. "Torrington,"* (Owners of), 3 B. W. C. C. 68 (1909) 6 N. C. C. A. 715; *Olson v. Steamship "Dorset"* (owners of) (1913) W. C. & Ins. Rep. 604, 6 B. W. C. C. 653, 6 N. C. C. A. 715.

84. *Maskery v. Lancashire Shipping Co. Ltd.*, (1914) W. C. & Ins. Rep. 290, 6 N. C. C. A. 708.

employment; in other words, the causative danger must be peculiar to the work and not common to the neighborhood. In the light of such authorities, the board found that the evidence in the instant case did not justify a finding that the employee died of heat prostration, superinduced by his employment.⁸⁵

Where an employee suffers from paralysis due to cerebral hemorrhage, caused by heat and overexertion, it was held that his disability was caused by an accident.⁸⁶

The English decisions make a distinction between the prostration caused by the sun's rays and prostration caused by artificial heat. In the former class, the injury is denied to be one arising out of the employment, and in the latter the employment is considered to be the source of the injury. Thus, where an employee was seized with heat apoplexy (sunstroke), it was held that this was not an accident.⁸⁷

Where a boss roller in a rolling mill was attacked by heat prostration, resulting in death, it was held that the prostration was an injury, within the meaning of the Ohio Act.⁸⁸

Where a laborer, employed in the wash-house of defendant's brewery, was apparently overcome by heat, and died later, the court, in holding that deceased did not come to his death as the result of an accident, said: "The deceased in this case was subjected to the same dangers from the excessive atmospheric conditions of a humid summer day, as was every other person who had to work in the general locality of the brewery where he was employed. I am unable to find, from the evidence, that there was anything so unusual about the washroom of the brewery as to cause this

85. *Mooney v. Illinois Steel Co.*, Ill. Ind. Bd. No. 740, Sept. 1915, 12 N. C. C. A. 319.

86. *La Veck v. Park Davis & Co.*, 190 Mich. 604, 157 N. W. 72, 12 N. C. C. A. 325.

87. *Robson, Eckford & Co., Ltd. v. Blakey*, 1912 S. C. 334, 49 Sc. L. R. 254, 5 B. W. C. C. 536, 6 N. C. C. A. 710; *Rodger v. Paisley School Bd.*, 49 Sc. L. R. 413, 5 B. W. C. C. 547, 6 N. C. C. A. 710; *Tank v. City of Milwaukee, Wis.*, Wkm. Comp. Rep. 80 (1914), 6 N. C. C. A. 711; *Stinnette v. Gillespie Co., Ky.* W. C. D. Bull. (Nov. 1, 1917 to Jan. 22, 1919), pg. 5.

88. *Ress v. Youngstown Sheet & Tube Co.*, Ohio I. C. Nov. 13, 1914, 6 N. C. C. A. 713; *McGarva v. Hills*, 1 Conn. C. D. 533.

accident. There is some evidence to the effect that it was cooler there than outside. There is certainly no evidence that would justify me in reaching the conclusion that it was hotter there. The work he had been doing was of the usual character and he was, therefore, subjected to no unusual strain. He probably was overcome by heat; he had some beer to drink, and one of the witnesses testified: 'He was hitting the ice-water up pretty strong that morning.' There is, in fact, considerable evidence which would justify me in reaching the conclusion that his condition may have been induced by drinking water excessively or by alcoholism. Under all the circumstances of this case, after a careful examination of the authorities, I am of opinion that the heat stroke which deceased had was not an accident arising out of his employment.⁸⁹

Where the natural heat is intensified by artificial means, the tendency is to place the injury on the same footing as heat prostration from artificial heat, and to allow compensation. Thus, where a seaman was on duty on a blackened steel deck for several hours, with the temperature ranging from 108° to 120° Fahrenheit, and suffered from blindness, due to this exposure, it was held that the employment involved special exposure to the risk of sunstroke, and compensation was allowed.⁹⁰

A carpenter suddenly became unconscious and died, and medical experts attributed his death to heat exhaustion. An autopsy was performed, and it was found that the conditions which produced death could not have been produced by heat stroke. It was shown that deceased had been in good health prior to the date of his death, but that, shortly before, he had been told by his employer that his work was very defective and that the latter could no longer use him. The claim department recommended that the claim be

89. *Burke v. Ballantine & Sons*, (Essex C. P.) 38 N. J. L. 105, 12 N. C. C. A. 322; *Jaskulka v. Hartford & New York Transportation Co.*, 1 Conn. Comp. 542.

90. *Davies v. Gillespie*, 105 L. T. 494, 28 T. L. R. 6, 56 Sol. J. 11, 5 B. W. C. C. 64 (1911), 6 N. C. C. A. 713; *Morgan v. S. S. "Zenaida"* (owners of), 25 T. L. R. 446, 2 B. W. C. C. 19 (1909), 6 N. C. C. A. 714.

disallowed, and the report was adopted by the Industrial Commission.⁹¹

Where an employee suffered from heatstroke while working in a trench, it was held to be an injury arising out of the employment, and compensation was allowed.⁹²

Sunstroke, though classed as a disease, is not a disease strictly speaking, but is an injury of an accidental nature under the Federal Act.⁹³

Where an employee, engaged in shoveling coal, collapsed from the effects of the sun's heat, and later died as a result thereof, it was held that the employee sustained a personal injury within the meaning of the Workman's Compensation Act. The court said: "This untoward event or unexpected condition under which Ahern's work was carried on therefore constituted an accident which directly and contemporaneously caused this localized abnormal condition. We conclude that under the authority of our decisions Ahern's death from sunstroke was a compensable injury. The second question, 'Whether Ahern was exposed to such risk as to make the results thereof compensable,' is determined by ascertaining whether the sunstroke arose 'in the course of and out of his employment.' It clearly appears that he was doing what he was employed to do when he was stricken; hence the sunstroke did occur in the course of his employment. 'An injury "arises out of" an employment when it occurs in the course of the employment and as a proximate cause of it.' *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320, L. R. A. 1916 E, 584. An employment will be a proximate cause of an injury when it is the natural and necessary incident of the employment, or when the employment brings with it greater exposure to injurious results than those to which persons generally in that locality are exposed, and such injurious result occurs in the course of the em-

91. *In re Knittle*, Ohio Ind. Comm. No. 89545, July 1915, 12 N. C. C. A. pg. 317.

92. *Kringel v. Meyers*, Ill. I. Bd. Sept. 12, 1914, 12 N. C. C. A. 318; *Thompson v. Banning Gas & Lighting Co.*, 2 Cal. I. A. C. 571 (1915), 12 N. C. C. A. 327.

93. *Re J. J. Walsh*, Op. Sol. Dep. C. & J. pg. 193.

ployment. *Larke v. John Hancock Life Ins. Co.*, supra. The finding explicitly brings this case within this rule. It does appear that the sunstroke was an accident of Ahern's employment. And that his exposure and risk to sunstroke in this employment was far greater than that of the rest of the community. This is the final test applied by us in the *Larke Case*. That Ahern was not exposed to sunstroke in greater degree than others in the same employment, and than many other out-of-door workers, we hold to be immaterial, as we did in the *Larke Case*.⁹⁴

§ 250. **Sympathetic Affection of one eye by Injury to the Other.**—An employee was struck in the eye by a chip of steel, which caused total blindness of the injured eye, and all of the physicians advised an operation for its removal in order to prevent sympathetic ophthalmia of the other eye, which might cause its loss. The employee objected to the operation unless it could be performed in Italy. The court held that this objection was unreasonable and that the disability of the employee was due to his own unreasonable refusal to undergo an operation.⁹⁵

An employee suffered an accidental injury which caused a traumatic cataract. The other eye was sympathetically affected, causing total disability. This was held to be a compensable injury.⁹⁶

§ 251. **Testicles: Injuries to:**—Where a swamper slipped on a log, fell and injured his right testicle, necessitating an operation which later resulted in death, it was held that the death was due to the accident, and compensation was awarded.⁹⁷

94. *Ahern v. Spier et al.*, 91 Conn. 151, 105 Atl. 340, 3 W. C. L. J. 221.

95. *Nicotero v. Globe Indemnity Co.*, 2 Mass. Wkm. C. C. (1914), 531, 10 N. C. C. A. 187.

96. *Stachuse v. Fidelity and Casualty Co.*, 2 Mass. Ind. Acc. Bd. 324; *Weber v. Geo. Haiss Mfg. Co.*, —App. Div.— (1920), 181 N. Y. S. 140, 5 W. C. L. J. 872.

97. *Vasey v. Industrial Comm. of Wis.* 167 Wis. 479, 167 N. W. 823, 17 N. C. C. A. 89, 2 W. C. L. J. 424.

Where a canvasser was riding a bicycle, furnished by his employers for his work, and when the bicycle skidded he was thrown violently to the ground, with the result that a testicle was crushed and bruised, causing cancer, from which he died, compensation was allowed.⁹⁸

Where a carpenter was accidentally pushed off of two beams upon which he stood, and fell upon and astride of a single beam, suffering an injury to one of his testicles, necessitating its removal, compensation was allowed. The court held that the injury produced temporary disability and came within section II, paragraph 11, subdivision (a) of the New Jersey Act.⁹⁹

A workman engaged in splitting stones was injured by a fragment of stone flying and striking his left testicle. The injured testicle had to be removed. Later the right testicle was found to be tubercular, and this tubercular condition extended to the lungs. Physicians claimed that the tubercular condition would have developed in the absence of the accident. It was held that the claimant failed to show any causal relationship between the trauma hereinbefore described and the tuberculous conditions present in his system, whereupon compensation was allowed for the original injury and denied for the tubercular condition.¹

An automobile repair tester strained himself in cranking a motor. The accident necessitated removal of a testicle. A tumor followed the operation. The commission awarded him compensation, which the Appellate Division affirmed unanimously and without opinion.² The Commission decided to award compensation for impaired earning power to an iron worker, incapacitated by a blow on the testicle, due to slipping of a pair of tongs;³ but, for insufficiency of evidence, denied compensation to a blacksmith who claimed to have been struck on the testicle by a hammer.⁴

98. *Haward v. Rowsell and Mathews*, (1914), W. C. & Ins. Rep. 314, 7 B. W. C. C. 552, 9 N. C. C. A. 1028.

99. *Coslett v. Shoemaker*, 38 N. J. L. J. 116, 10 N. C. C. A. 1046.

1. *Frabbie v. Freeburg*, 1 Conn. C. D. 614.

2. *Smythe v. Packard Motor Co.*, 181 N. Y. App. Div. 907, Nov. 14, 1917, 137 N. Y. S. 1128.

3. *Muller v. Ludlum Steel Co.* N. Y. Comp. Bul., Vol. 2, pp. 15, 21.

4. *Cronk v. Turner*, S. D. R., vol. 13, p. 547, N. Y. Comp. Bul., Vol. 2, p. 167, Apr. 11, 1917.

No compensation will be allowed under the Indiana act "where there is no evidence that the removal of a testicle had or would in the slightest degree impair the future usefulness or opportunity of appellee, or that it had or would produce any disability for work, or a loss of any physical function."

Compensation will however be allowed for injury to testicles where it resulted in temporary disability.⁵

Under some acts compensation is allowed on the ground of impairment of a physical function.⁶

§ 252. **Tetanus.**—A street worker stepped upon a rusty nail, thereby piercing his foot. The wound became poisoned, resulting in tetanus, from which he died. Compensation was awarded.⁷

An employee received a lacerated wound, as the result of being struck by the bucket of a dredger, and developed tetanus. This was held to be the result of the accidental injury.⁸

Shortly after a fall of coal from the roof of a mine at the place where a miner was working, he complained of his foot hurting. Twelve days later he died of tetanus. A physician found an abrasion on the outer side and a scar on the sole; both wounds were healing, and at the time of his death the wounds were healed. The court found that the death was due to an accident.⁹

Where a longshoreman died as a result of tetanus, caused by having his foot crushed and lacerated by lumber falling upon it, it was held that his death was due to the accidental injury, and compensation was awarded.¹⁰

Where a gardener stepped upon a nail while at work, and a month later died from tetanus, it was held that the evidence supported a finding that the death resulted from the injury¹¹

5. *Centlivre Beverage Co. v. Ross*,— Ind. App. —, 125 N. E. 220, 5 W. C. L. J. 212; *International Harvester Co., v. Indus. Comm.* 157 Wis. 167, 147 N. W. 53, 5 N. C. C. A. 822.

6. *Hercules Powder Co. v. Morris County Ct. of Common Pleas*, — N. J. —, 107 Atl. 443, 4 W. C. L. J. 523.

7. *Putnam v. Murray*, 174 N. Y. App. Div. 720, 160 N. Y. Supp. 811.

8. *Oaks v. Berkeley Steel Co.*, 1 Cal. 2, A. C. Part 2, 218.

9. *Stapleton v. Dinnington Main Coal Co.*, 1912, 5 B. W. C. C. 602.

10. *Broderick v. Southern Pac. Co.*, 4 N. Y. St. Dep. Rep. 371.

11. *Walker v. Mullins*, (1909), 1 B. W. C. C. 211 C. A.

§ 253. **Trachoma.**—Where an employee, who had been severely burned about the face and eyes, was found to be suffering from trachoma, but the evidence showed that this condition of the eyes was due to infection, and not to the burns received by the accident, compensation was denied, because the disability resulting from the burns did not last beyond the waiting period of two weeks. Medical expenses necessitated by the burning were allowed.¹²

Where a workman, who had been injured in the eye by a flying piece of steel, claimed compensation for trachoma, alleged to have been caused by the injury. The application was dismissed, the court saying: "Trachoma is recognized as a disease by the medical profession and it is said not to be brought about by injury to the eye or by foreign particles getting into the eye."¹³

Where an employee, suffering from trachoma, was incapacitated, following the blowing of cement dust in his eyes, compensation was denied for the continued disability due to the disease of trachoma, which is a highly infectious disease, not caused by an accident.¹⁴

§ 254. **Tuberculosis.**—An electrician was engaged in stringing wires in an ash cellar and became ill from coal gas. Three months later he died of pulmonary tuberculosis. It was held that there was sufficient evidence to support a finding that death was due to the gas poisoning, and compensation was allowed.¹⁵

Under the Federal Act, tuberculosis caused by brass poisoning was held to be an injury.¹⁶

Where a stevedore ruptured himself on the right side, necessitating an operation, and later he developed pulmonary tubercu-

12. *Guardian Cas. Guar. Co. v. Castilo*, 1 Cal. Ind. A. C. D. (No. 9, 1912) 5, 6 N. A. C. C. 897.

13. *In re Leware*, Ohio I. C. Aug. 21, 1914, 6 N. C. C. A. 897.

14. *Beauchamp v. Chanslor-Canfield Midway Oil Co.*, 2 Cal. I. A. C. 285.

15. *Odell v. Adirondack Electric Power Co.*, 223 N. Y. 686, 119 N. E. 1063, 17 N. C. C. A. 877; *Black v. Traveler's Ins. Co.*, 1 Mass. I. A. Bd. 319.

16. *Re Edward Devine Op. Sol. Dept. L.* pg. 277.

losis, from which he died, on conflicting medical testimony, the county court held that the applicant had not sustained the burden of showing that there was any connection between the rupture and the death.¹⁷

Decedent sustained a severe injury to the lower part of his back, as the result of an accidental fall. Later he died from pulmonary tuberculosis, a disease with which he was afflicted prior to the date of the injury. In affirming an award, the court said: "The evidence authorizes the inference that the accidental injury suffered by Cruse while in appellant's employment aroused the latent germs of the disease to which he was predisposed, materially accelerated the disease, and caused his death earlier than it would otherwise have occurred."¹⁸

Compensation was denied for disability caused by tubercular pleurisy following an accidental injury, upon failure to show that the disease, which developed three weeks after the accident, was due to the accidental injury.¹⁹

Tuberculosis which develops gradually as an occupational disease, and is not due to traumatism, is not a compensable injury.²⁰

Where a gradually lowering vitality, pains, miliary tuberculosis and death successively followed a gas explosion, which caused first degree burns about the employee's face, the employee

17. *Kemp v. Clyde Shipping Co., Ltd.*, 119 L. T. R. 131 (1918) 17 N. C. C. A. 875. *In re Nicholas Hurfurth*, 3rd A. R. U. S. C. C. 143. *In re Joe Wilson*, 3rd A. R. U. S. C. C. 143; *In re Frank Gale*, 3rd A. R. U. S. C. C. 144; *Garnett v. Buchanan*, 3rd A. R. U. S. C. C. 145.

18. *Retmier v. Cruse*, —, Ind App., —, 119 N. E. 32, 17 N. C. C. A. 870; 1 W. C. L. J. 971; *Hatch v. J. Newman & Sons*, 1 Conn. C. D. 65; *Nelson v. McLarnon & Co. Inc.*, (1916), 9 N. Y. S. Dep. Rep. 325; *Bakeman v. Devine & Sons*, (1916), 9 N. Y. S. Dep. Rep. 322. *Glennon's Case* — Mass., —, (1920), 128 N. E. 942, 7 W. C. L. J. 210. *In re F. A. Peterson*, 3rd A. R. U. S. C. C. 145; *Republic Iron & Steel Co. v. Markiewicz—Ill.*, —, (1921), 129 N. E. 710.

19. *Gomez v. Southern Eureka Mining Co.* 1 Cal. I. A. C. Part 1, 180; *Frabbie v. Freeburg*, 1 Conn. C. D. 615.

20. *Dependents of William Francis Kane v. New Haven Union Co.*, 1 Conn. C. D. 492.

having previously been in good health, the death was held to have been caused by the accident.²¹

Where a workman, injured by an explosion, claimed that subsequently contracted tuberculosis was directly caused by the accident, it was held, on conflicting testimony, that he had not sustained the burden of his contention, and compensation was awarded for the direct injuries, but not for the disability due to the tuberculosis.²²

Where an employee working on a crane was compelled to jump into the river to save himself, and the exposure which resulted caused pulmonary tuberculosis, it was held that he suffered an accidental injury.²³

Where an employee at the time he received a severe blow on or over the spine, was affected with Pott's disease, or tuberculosis of the spine, and that said disease, by reason of the injury, became incited to virulent activity, rendering the employee totally and probably permanently disabled about five weeks after the accident, compensation was allowed, the court saying: "Likewise the courts, consistent with the theory of workmen's compensation acts, hold with practical uniformity that, where an employee afflicted with disease receives a personal injury under such circumstances as that he might have appealed to the relief on account of the injury had there been no disease involved, but the disease as it in fact exists is by the injury materially aggravated or accelerated, resulting in disability or death earlier than would have otherwise occurred, and, the disability or death does not result from the disease alone progressing naturally as it would have done under ordinary conditions, but the injury, aggravating and accelerating its progress, materially contributes to hasten its culmination in disability or death, there may be an award under the compensation acts."²⁴

21. Heileman Brewing Co. v. Schultz, 161 Wis. 46, 152, N. W. 466, 15 N. C. C. A. 643.

22. Feldman v. Westinghouse Electric and Min. Co., 36 N. J. L. J. 48,

23. Rist v. Larkin & Sangster, 156, N. Y. Supp. 875, 171 App. Div. 868; In re Evar Soderstrom, 3rd A. R. U. S. C. C. 146.

24. In re Colan, 64 Ind. App.—, 116 N. E. 842, 15 N. C. C. A. 633.

An employee suffered a strain, and later died of milary tuberculosis. Medical testimony was to the effect that the conditions following an injury that are necessary to cause the tubercular germ to become active were not present, and in no case could a strain cause the germs to become active. The court held that the evidence failed to show any relation between the injury and the diseased condition which caused the death.²⁵

Where tuberculosis of the bone developed several months subsequent to an injury to a wrist, and evidence showed that no tubercular condition existed prior to the injury, it was held that this was an injury, and compensable under the California Act.²⁶

Compensation was denied for disability due to pulmonary tuberculosis, claimed to have been brought on through exposure during a ride in an automobile provided by the employer for taking his men to their place of work. Medical testimony was to the effect that climatic conditions on the day of the ride had no effect on the disease, nor did the chill. It was held that there was no causal connection between the claimant's employment and the tuberculosis; that his employment neither produced the disease nor accelerated its progress.²⁷

Compensation was denied for tubercular peritonitis, alleged to have been caused by a fracture of a leg, because of insufficient evidence to show any connection between the injury and the disease.²⁸

An employee, while engaged in lifting a box, fell and struck his neck above the collar bone, and about nine months later he died of pulmonary tuberculosis. In affirming an award, the court said: "The evidence shows quite clearly, and the commission has found, that the disease existed before the injury, which accelerated the disease and shortened life. The injury caused a hemorrhage,

25. *Albaugh-Dover Co. v. Industrial Bd. of Ill.* 278, Ill. 179, 115 N. E. 834, 14 N. C. C. A. 545.

26. *Soria v. Marshall*, 3 Cal. I. A. C. 96; *Stone v. S. L. Smith Co.* (1916) 3 Cal. I. A. C. 365; *Lorenzo v. Begelow-Hartford Carpet Corp.* 1 Conn. C. D. 216. In re *James E. King*, 3rd A. R. U. S. C. C. 146.

27. *Dionne v. Fred T. Ley Co.*, (Mass.) W. C. Cas. No. 1622, 1915, 12 N. C. C. A. 314; *Franklin v. U. S. Casualty Co.*, 2 Mass. Ind. Acc. Bd. 758.

28. *Capelli v. Crawford*, 6 N. Y. S. Dep. Rep. 349.

which, so far as the evidence discloses, the deceased never experienced before or after, and there is medical testimony to the effect that such an injury would develop the disease then existing. If an employee has a disease, and, having the same, receives an injury 'arising out of and in the course of employment,' which accelerates the disease and causes his death, such death results from such injury, and the right to compensation is secured, even though the disease itself may not have resulted from the injury.''²⁹

An employee was crushed under a load of lumber and sustained several broken ribs, and other lesser injuries. He was confined to his bed until his death, six weeks later. An autopsy disclosed that the decedent had pulmonary tuberculosis in such an advanced stage that one lung had been entirely destroyed and the other to a considerable extent, also that he was suffering from other diseases. Three physicians testified that, in their opinion, his death was caused by pulmonary tuberculosis, and that the injuries which he had sustained were not sufficient either to cause or hasten his death. Other witnesses testified that deceased had worked continuously at hard labor until the accident, had apparently been in good health at all times theretofore, and had never been able to leave his bed thereafter. The court held that the trial court was not concluded by the testimony of the experts, and its finding that the death was caused by the injuries was sustained.³⁰

Where tuberculous infection developed in a wound caused by an accidental injury, compensation was allowed.³¹

Where a condition of tuberculosis, which had been dormant, was aggravated by an accidental injury, to renewed activity, the subsequent illness due to the renewed tubercular infection is proximately caused by the accident, and compensation may be awarded therefor. In this case the medical testimony showed that the injury constituted only a sprain of the ankle, but that the accident had caused a latent tubercular condition to spring into renewed activity.³²

29. *Van Keuren v. Dwight Divin & Sons*, 179 N. Y. App. Div. 509, 165 N. Y. Supp. 1049, 15 N. C. C. A. 644.

30. *State ex rel Jefferson v. District Court of Ramsey Co.*, 138 Minn. 334, 164 N. W. 1012, 15 N. C. C. A. 645, 1 W. C. L. J. 216.

31. *Festa v. Burns Co.*, (1916) 9 N. Y. St. Dep. Rep. 277.

32. *Maurmann v. Chirhart & Nystedt*, 1 Cal. I. A. C. D. 1914, 499, 10

Where an employee suffered an injury to his wrist and the recovery was impeded by a tubercular condition of the wrist, on the question whether the employer was liable for the prolonged disability or only for the length of time which an ordinarily healthy person would be incapacitated, the commission held that: "An employer must take his employees as he finds them. An exception is made, however, where the duration of a disability is unduly prolonged by syphilis, chronic varicose ulcers, or tuberculosis, and in such cases compensation will be awarded only for the longest period of disability for which a normal person sustaining the same accidental injury would reasonably be disabled. This exception controls the present case where applicant was suffering from a tubercular condition."³³

Where deceased sustained injuries as a result of being thrown from the van which he was driving, when his horse ran away, and 6 months later died from tuberculosis, it was held that the finding that death was due to the injuries received was sustained by the evidence.³⁴

Tuberculosis is not recognized as an occupational disease, and will not be considered as an industrial injury unless there is proof that the tubercular condition was caused by an injury.³⁵

Evidence that an employee received a slight blow on the jaw, is not sufficient to sustain an award for incapacity resulting from tuberculosis of the cervical glands, alleged to have been brought on by the injury.³⁶

Where the evidence showed that the tuberculosis of the left knee developed as the result of an injury, it has been held that a previous tubercular tendency would in no way affect a right to compensation.³⁷

N. C. C. A. 768; *Birk v. Matson Nav. Co.*, 2 Cal. I. A. C. D. (1915), 177, 10 N. C. C. A. 769.

33. *Van Dalsem v. Di Fiore*, 1 Cal. I. A. C. D. (1914) 229, 10 N. C. C. A. 769.

34. *Beare v. Garrod*, 8 B. W. C. C. 474, 10 N. C. C. A. 756.

35. *Coates v. City of Elsinore* (1916) 3 Cal. I. A. C. 269.

36. *In Re Claim of T. F. Luttrell* (1909) No. 852, Op. Sol. Dep. C. & L. 1915, 219, *Leary v. Traveler's Ins. Co.*, 2 Mass. I. A. Bd. 184.

37. *Wabash R. R. Co. v. Industrial Comm.*, 286, Ill. 194, 197, 121 N. E. 569.

A tender on a paper machine sustained injuries when his hand was caught between the rolls of the machine. As a result of the injuries, many operations were necessary, thereby reducing his vitality and accelerating a condition of tuberculosis more or less lingering, which caused his death. Compensation was allowed.³⁸

§ 255. **Tumor.**—A sales lady claimed that while she was taking down a heavy coat, hanging on a rod somewhat higher than she could conveniently reach, she felt a sudden pain in her right side and groin, and claimed compensation for disability alleged to have resulted from the injury. Medical testimony showed that the applicant was suffering from a fibroid tumor of the uterus, that such tumor was in existence at the time of the accident, and the disability suffered was due to the existence of the tumor and not to the accident. Compensation was denied.³⁹

A workman met with a severe accident when a heavy strut fell on his back near the region of his kidneys. Later it was discovered that he was suffering from a tumor, and in an operation to remove the tumor the workman died. Compensation was allowed.⁴⁰

A carpenter, at work on his knees, strained his knee upon rising, resulting in prolonged disability. An operation revealed fibrolipoma or fatty tumor under the knee cap, which existed prior to the accident, but not causing any disability. It was held that the disability resulting from an aggravation of the diseased condition was compensable.⁴¹

Compensation was allowed for disability resulting from the aggravation of the condition of a tumor existing prior to the accidental injury.⁴²

38. *Friday v. Galusha Stove Co.*, 181 N. Y. App. Div. 961, 168 N. Y. S. 1109; *Champine v. De Grasse Paper Co.*, 181 N. Y. App. Div. 909, 167 N. Y. S. 1092; *Callow v. Otis Elevator Co.*,—N. Y. App. Div.—, Death case No. 7376, Oct. 4, 1917.

39. *Cook v. Employer's Liab. Assur. Corp. Ltd.*, 1 Cal. I. A. C. D. (1914) 420, 10 N. C. C. A. 773.

40. *Lewis v. Port of London Authority*, (1914), W. C. & Ins. Rep. 299, 6 N. C. C. A. 625.

41. *Globe Indemnity Co. v. Terry*, 2 Cal. I. A. C. D. 682.

42. *Big Muddy Coal and Iron Co. v. Industrial Bd.*, 279 Ill. 235, 116 N. E. 662.

Compensation was denied for the death of a workman alleged to have been caused by an injury sustained when a fellow employee dropped a hammer, which struck the deceased, causing a tumor on the brain. The commission held that the evidence failed to sustain the allegations of claimant.⁴³

§ 256. **Typhoid Fever.**—Action was brought to recover damages for the death of an employee, caused by typhoid fever alleged to have resulted from contaminated drinking water furnished by the employer. In overruling the defendant's demurrer, which stated that the death was caused by such an injury as was within the workman's compensation act, and that the plaintiff must seek redress under that act, the court held that the words "injured or killed" as used in the act contemplated injury or killing through outside violence accidentally applied, and not death from disease such as the one under contemplation here.⁴⁴

An employee fell from a wagon, striking his head on a car rail, and sustaining injuries which incapacitated him from work. A week later he died. In awarding compensation the commission found, "at the time of his accident, Harry Banks was suffering from typhoid fever in the incubation stage, which became aggravated by the severe injury to his head through the consequent lowering of his resisting power, and the said disease thus aggravated caused his death." The court of appeals affirmed a judgment of the appellate division affirming the award.⁴⁵

Where an employee sought compensation for temporary disability caused by typhoid fever, alleged to have resulted from germs ingested by drinking infected water furnished by the employer, the court said: "Our statute, so far as here important, provides for compensation 'in every case of personal injury * * * caused by accident, arising out of and in the course of employment,' and then provides that the word 'accident,' as used therein shall 'be construed to mean an unexpected or unforeseen event, happening

43. *Siegel v. Belknap Mfg. Co.*, 2 Conn. C. D. 402.

44. *Robbins v. Victor Rubber Co.*, 21 Ohio N. P. (N. S.) 17, 17 N. C. C. A. 785, *Contra*, *Aetna Life Ins. Co. v. Portland Gas & Coke Co.*, 229 Fed. 552, 144 C. C. A. 12, L. R. A. 19166D, 1027.

45. *Banks v. Adams Exp. Co.*, 221 N. Y. 606, 117 N. E. 1060, 15 N. C. C. A. 638.

suddenly and violently, with or without human fault and producing at the time, injury to the physical structure of the body.' ” G. S. 1913, Sections 8203, 8230

“The evidence shows that typhoid fever is a germ disease; that it is produced by taking typhoid bacilli into the alimentary canal; that no deleterious effects result until the bacilli taken into this canal have multiplied enormously; and that it requires more than a week after the infection for the disease to develop sufficiently for its symptoms to be discernible. The disease does not result from an event which happens ‘suddenly and violently,’ nor from an event which produces ‘injury to the physical structure of the body’ at the time it happens.”⁴⁶

Where it was shown that an employee's death resulted from typhoid fever contracted from drinking impure water furnished by the employer for the use of the employees, the court, in holding that death was proximately caused by accident within the meaning of the workman's compensation act, said: “The fact that deceased became afflicted with typhoid fever while in defendant's service would not in the sense of the statute constitute a charge that he sustained an accidental injury, but the allegations go further, and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant, as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickness was the result of an uniptended and unexpected mishap incident to his employment. These allegations fulfill requirements of the statute that the drinking of the polluted water by the deceased was an accidental occurrence, while he was ‘performing service growing out of and incidental to his employment.’ It is alleged that the consequences of this alleged accident resulted in afflicting Vennen with typhoid disease, which caused his death. Diseases caused by accident to employees while ‘performing services growing out of and incidental to his employment’ are injuries within the contemplation of the Workmen's Compensation Act.

46. State ex rel. Faribault Woolen Mills Co. et al. v. District Court of Rice County et al., 138 Minn. 213, 164 N. W. 810, 15 N. C. C. A. 520, 1 W. C. L. J. 89.

This was recognized in the case of *Heileman Brewing Co. v. Industrial Commission*, 152 N. W. 446, and *Voetz v. Industrial Commission*, 152 N. W. 830. The English Compensation Act made employers liable to employees for 'personal injury by accident arising out of and in the course of the employment.' Under this act it has been held that contraction of a disease may be caused by accident.⁴⁷

Where a workman had been engaged for several years in removing sewage, there was no evidence to sustain a finding that his death was due to an accident, merely because he contracted typhoid fever which caused his death.⁴⁸

Where an employee underwent an operation for a hernia and a few days later was found to be suffering from typhoid fever, such typhoid fever will not be presumed to have resulted from the hernia or operation, and compensation will not be allowed for the prolonged disability.⁴⁹

Decedent's leg was broken both above and below the knee by an accident arising in the course of his employment, and some time nearly a year later he contracted typhoid fever from which he died. The Board, holding that the connection between the decedent's condition as the result of his accident and his attack of typhoid fever was too remote, said: "Where alternative theories are developed by the evidence, one of which will fix liability upon the defendant, while the other will not, speculation is not permitted in order to afford a basis for a recovery."⁵⁰

§ 257. **Ulcers.**—An employee suffered an injury as a result of a flying piece of steel striking his eye. He sought compensation for prolonged disability due to trachomatous ulcers. In denying

47. *Vennen v. New Dells Lbr. Co.*, 161 Wis. 371, 154 N. W. 640, 10 N. C. C. A. 729, L. R. A. 1916 A, 283. *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, 156 N. W. 143; *In re Wm. Rawles*, 3rd A. R. U. S. C. C. 147.

48. *Finlay v. Tullamore Guardians*, (1914), 7 B. W. C. C. 973, C. A. *In re John J. Milstead*, 3rd A. R. U. S. C. C. 151.

49. *Viglione v. Montgomery Garage Co.*, 2 Cal. I. A. C. D. 87.; *Johnson v. Casualty Co. of America*, 2 Mass. Wkm. C. C. 170.

50. *Tennessee Blankenship v. Majestic Coal Co.*, claim No. 282, Workman's C. Bd. of Ky. Bul. for Nov. 1st., 1917 to Jan. 22, 1919, pg. 153.

compensation, it was said: "Trachoma is recognized as a disease by the medical profession and it is said not to be brought about by an injury to the eye or by foreign particles getting into the eye."⁵¹

Where foreign substances entered the eye of an employee during and in the course of his employment, which caused irritation and ulceration resulting in loss of the eye, the loss was due to the accident.⁵²

Where ulcers were caused by scratches and abrasions being the proximate cause, compensation was awarded for the disability, caused by the ulcers.⁵³

A healthy workman received a blow upon the stomach, causing severe pains and continuous disability, the blow having been severe enough to cause internal injuries, and two months later he was found to be suffering from a duodenal ulcer. No evidence was produced sufficient to show that the ulcer existed at the time of the injury, or, if it did exist, to having been active; but that if there did exist such a dormant ulcer the blow was sufficient to aggravate its condition. The accident was held to be the cause of the disability.⁵⁴

Compensation was refused for the death of an employee where it was alleged that the death was caused by ulcers of the stomach resulting from an injury to the hand. It was held that there was no causal connection shown to exist between the injury and the cause of the death.⁵⁵

An employee received a blow upon the stomach, followed by disability. Medical testimony and examination showed that the illness was due to ulceration of the stomach, and that prior to the accident the employee had been treated for gastritis. It was held that the disability was due to natural causes.⁵⁶

51. In re LeWare, Ohio I. C. Aug. 21, 1914, 6 N. C. C. A. 897.

52. Grant v. Narlion, 1 Cal. I. A. C. 482.

53. McMullen v. Standard Oil Co., 1 Cal. I. A. C. (Part 2), 169.

54. Snyder v. Pacific Tent and Awning Co., 3 Cal. I. A. C. D. 1.

55. Twoomey v. Royal Indemnity Co., 2 Mass. I. A. Bd. 540.

56. McLean v. Brooks, 2 Cal. I. A. C. D. 288.

In the absence of sufficient evidence to show that there was an injury of sufficient magnitude to cause intestinal ulcers, compensation was denied for the disability, alleged to have been caused by the ulcers.⁵⁷

Where an employee suffers a bruise as the result of an injury and an ulcer subsequently develops therefrom, the employee has sustained a compensable injury.⁵⁸

Where an employee is suffering from an acute gastric ulcer, which, according to medical testimony, will puncture the walls of the stomach, and did puncture the walls of the stomach immediately after the exertion of cranking his employer's automobile, such injury was not caused by the exertion. The exertion was the occasion but not the cause of the puncture, and therefore is not compensable.⁵⁹

§ 258. **Vaccination.**—Claimant was compelled to submit to vaccination, which was requested by the board of health. Following the vaccination claimant was found to be suffering from "Acute Mastoiditis, lymphatic infection." An operation was performed which incapacitated claimant for a considerable time. Reversing the award, the court held that even assuming that the acute mastoiditis was caused by the invasion of the germs through the vaccination wound, there was a lack of evidence tending to show that the germs secured lodgment in claimant's arm in the course of her employment. The court said: It seems quite clear to us that claimant has failed to show any connection between her employment in the store of respondent and the infection following vaccination. There was nothing in her employment which made her more susceptible to the reception of the germ than if she was walking upon the street or attending a theater or church. In other words the risk of infection was such and such only as that to which the general public is exposed. Claimant's injury, if it can be traced to the vaccination, arose not out of her employment with the respondent, but through the active agency of the Detroit

57. *Hyland v. Winant, Inc.*, 6 N. Y. St. Dep. Rep. 304.

58. *Hoffman v. Korn*, 2 Cal. I. A. C. D. 166.

59. *Chenowith v. Mitchell*, 2 Cal. I. A. C. D. 75.

Board of Health, which for the benefit of the general public requested her to submit to the operation."⁶⁰

An employee submitted to vaccination against his will at the order of his superior. Later death resulted from septicæmia and the question was whether the infection of a vaccination on the arm would result in an abscess of the knee which would cause death. Upon a conflict of testimony, it was held not to be due to the vaccination.⁶¹

Under the Federal act an employee submitting to a vaccination, ordinarily harmless, at the direction of a superior officer, and sustaining injuries thereby, is entitled to compensation.⁶²

Where an employee submitted to a vaccination in obeying the orders of the Board of Health, and infection followed, incapacitating the employee, it was held to be a personal injury.⁶³

§ 259. **Varicose Veins.**—Applicant claimed to have suffered a strain while lifting, which resulted in varicocele, necessitating an operation. In denying compensation, the Commission said: "The statute requires that the applicant establish to a moral certainty the fact of accident and that the injury was proximately caused by such accident. The applicant was unable to do this. Medical and surgical opinion is that varicocele is almost never the result of an injury, but is a gradual development, as in the case of varicose veins in general. Therefore, this application for compensation must be denied."⁶⁴

A teamster was kicked by a horse and was incapacitated by a varicocele, alleged to have been caused by the blow on the groin when he received the kick. In allowing compensation, the commis-

60. *Krout v. J. L. Hudson Co.*, 200 Mich. 287, 166 N. W. 848, 16 N. C. C. A. 881, 1 W. C. L. J. 1048.

61. *In Re Miller*, Ohio Ind. Comm. No. 78, 789, Aug. 16, 1915, 11 N. C. C. A. 506.

62. *Re C. B. Flora*, Op. Sol. Dep. C. & L. pg. 188; *Re Joseph D. Haley*, Op. Sol. Dep. L. p 255.

63. *Fevore v. Employers Liab. Assur. Corp.*, 2 Mass. I. A. Bd. 332.

64. *Holden v. Maryland Cas. Co.*, 1 Cal. I. A. C. D. (No. 1, 1914) 11, 4 N. C. C. A. 859; *In re Emil Beyer*, 2nd A. R. U. S. C. C. 139; *In re James F. O'Donnell*, 2nd A. R. U. S. C. C. 139.

sion said: "The issue is not easy of determination. Ordinarily varicocele comes through gradual development and afflicts men who have to stand much upon their feet, but it is conceded by competent medical authorities that it may result from an accident."⁶⁵

Where a foundry helper suffered from a burn, due to the spattering of hot iron, and later received a second burn, which aggravated a pre-existing varicose condition, necessitating an operation, compensation was allowed.⁶⁶

An employee sustained an inguinal hernia and was operated upon. Shortly afterward a lump was apparent upon his groin. A second operation showed that the lump was due to a varicocele, aggravated but not caused by the hernia. It was held that the employee was not entitled to compensation for continued disability due to the varicocele.⁶⁷

Since the employer takes the employee as he finds him, it was held that where an employee 50 years of age, weighing over two hundred pounds, whose physical condition was so poorly that a slight injury would result in extended disability, and who was injured when a wheelbarrow fell upon him, resulting in varicose veins and other diseases, that all of the disability was compensable.⁶⁸

Where an employee sustains an accidental injury, which is aggravated by a pre-existing varicose condition, prolonging the disability, compensation will be allowed for the length of time the employee would have been disabled were it not for the pre-existing diseased condition.⁶⁹

An employee who was moving barrels in some way got between two barrels and jammed his scrotum, which he claims brought on a varicocele six months later. It was held upon expert testimony

65. *Mitchell v. McNab & Smith*, 1 Cal. I. A. C. D. (No. 7, 1914) 14, 6 N. C. C. A. 399.

66. *Mustaikas v. Casualty Co. of America*, 2 Mass. Wk. Comp. Cases 547.

67. *Jorgensen v. Healy-Tibbits Const. Co.*, 2 Cal. I. A. C. D. 46.

68. *Rounda & Spivock v. Heenan* 3 Cal. I. A. C. D. 36.

69. *Fisher v. Union Ice Co.*, 2 Cal. I. A. C. 93.

that traumatism, like that suffered by the claimant, will not cause a varicocele six months after the accident. Compensation was denied.⁷⁰

§ 260. **Vertigo.**—Where an employee received an accidental injury, and vertigo followed, but medical testimony indicated no fracture of the skull or concussion of the brain, and that the vertigo was due to arterio sclerosis, compensation was denied, because the disability was not caused by an accident.⁷¹

§ 261. **Wood Alcohol Poisoning.**—A show card writer, who used wood alcohol for the purpose of dissolving certain dyes for use in his work, suffered the loss of his eyesight. Just prior to the accident he used an extraordinary quantity in cleaning the apparatus and his hands. This was held to be an accidental injury.⁷²

A family servant used wood alcohol in starting a fire, and was burned to death as a result thereof. This was held to be an accident arising out of the employment.⁷³

A sign painter who used wood alcohol in his preparation of dyes, suffered from a total loss of eyesight after using an extraordinary amount. In distinguishing this injury from an occupational disease, and allowing compensation therefor, the commission said: "The loss of the vision by poisoning by wood alcohol is not among the number of diseases standardized and commonly classified as occupational disease, and we think that without doing violence to the statute, we may reasonably regard the sudden destruction of the vision by the use of wood alcohol as an accident. * * * We recognize that the issue is one of extreme difficulty, and that two opinions may reasonably be entertained as to the

70. *Keen v. Burns*, 2 Conn. C. D. 170.

71. *Carter v. Llewellyn Iron Works*, 2 Cal. I. A. C. 855. See *Falls from vertigo or other like causes*.

72. *Fidelity & Casualty Co. of New York et al. v. Industrial Accident Com. of Cal.* et al., 177 Cal. 472, 171 Pac. 429, 17 N. C. C. A. 784, 1 W. C. L. J. 903.

73. *Kolaszynski v. Klfe*, 91 N. J. L. 37, 102 Atl. 5, 15 N. C. C. A. 160.

correctness of our decision, but we believe that the weight of authority, of justice and of sound reason is on the side of awarding compensation in this case.”⁷⁴

74. *Dewitt v. Jacoby Bros.*, 1 Cal. I. A. C. D. (1914), 170, 6 N. C. C. A. 488.

CHAPTER VI.

ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

Sec.

262. Arising Out Of And In The Course Of In General.

ACCIDENTS SUSTAINED IN GOING TO AND FROM PLACE OF EMPLOYMENT.

- 263. Going To Work In Own Conveyance.
- 264. Going From Work In Own Conveyance.
- 265. Going To And From Work In Conveyances Furnished By Employer.
- 266. While Walking To And From Work.
- 267. Going To And From Work Using Conveyances Of Third Parties.
- 268. Going To And From Work, On Premises Of Employer And While Passing Over Ways Of Egress And Ingress.
- 269. Going To And From Work Where Employment Is Not Limited To Fixed Hours.
- 270. Seamen And Others Employed On Vessels Injured When Getting On And Off Vessels.
- 271. Away From Place Of Employment On Business Of Employer.
- 272. Street Accidents.

NON-WORKING TIME INJURIES.

- 273. Miscellaneous Accidents Before And After Work Hours.
- 274. During Temporary Cessation Of Work At The Direction Of Employer And For Own Purposes.
- 275. Going To Report To Employer.
- 276. Lunch Hour Injuries, On The Premises And Going To Place Off Premises For Luncheon.
- 277. Going To Receive Pay.
- 278. Going To Answer A Call Of Nature.
- 279. Injuries Sustained After Work Hours, By Employees Furnished Lodgings On The Premises And To Employee Visiting The Premises On Sundays For Purposes Not Connected With The Employment.
- 280. Away From Place Of Employment On Own Business Or Business Other Than Employer's.
- 281. Accidents Under Contract But Before Beginning Work, Before Actual Hiring, And After Discharge.

ACCIDENT ARISING OUT OF COURSE OF EMPLOYMENT.

CHAPTER VI. (CONT'D)

EMPLOYEES OR ANOTHER'S WILFUL MISCONDUCT.

Sec.

282. In General.

283. Acts Not Constituting Wilful Misconduct.

284. Acts Constituting Wilful Misconduct.

285. Sportive Acts.

286. Added Risk To Peril.

287. Employer's Wilful Misconduct.

288. Injury Sustained While Performing Acts For Personal Conveniences or Pleasure Of The Employee.

289. Miscellaneous Accidents Occurring Within "War Zone" And In Munition Works Together With Questions Pertaining To Employees In Military Service, As Affected By Compensation Acts.

"AGGRAVATION" CASES AS AFFECTED BY THE DOCTRINE OF PROXIMATE CAUSE.

290. Aggravation Of Pre-Existing Condition.

291. Aggravation Of An Injury By Subsequently Intervening Causes.

292. Accidents Occurring To Employees While Performing Acts For The Master Other Than Those Within Their Particular Line Of Duty or Whose Conduct While Performing Their Duties To The Master Places Them Outside Of The Scope Of Their Employment.

ASSAULTS.

293. Resulting From Controversies Connected With Or Pertaining To Employment.

294. Resulting From Controversies Not Connected With Or Pertaining To Employment.

295. Burden Of Proof To Show That The Injury Was Caused By An Accident And That The Accident Arose Out Of And In The Course Of The Employment.

RULINGS AFFECTING SPECIFIC CASES AS ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

296. Acting Under Unauthorized Orders.

297. Acids.

298. Act Of God.

299. Anæsthetic Causing Death During Surgical Operation.

300. Anthrax.

301. Appendicitis.

WORKMEN'S COMPENSATION LAW

CHAPTER VI. (CONT'D)

Sec.

- 302. Apoplexy.
- 303. Apprentice.
- 304. Asphyxiation.
- 305. Assisting A Fellow Employee; Employee Of Another Employer Or A Stranger.
- 306. Bite Of Animals.
- 307. Bites And Stings From Insects And Reptiles.
- 308. Bone Felon.
- 309. Brights Disease.
- 310. Burns.
- 311. Cancer.
- 312. Carbuncle.
- 313. Charity Worker And Persons Seeking Relief From Charity Injured.
- 314. Chauffeur.
- 315. Concussion Of Brain.
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- 317. Delirium Tremens.
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- 319. Drivers Injured.
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- 322. Emergency.
- 323. Erysipelas.
- 324. Explosions.
- 325. Exposure.
- 326. Eye Injuries.
- 327. Falls From Vertigo Or Other Like Causes.
- 328. Falling Objects.
- 329. Frost Bites And Freezing.
- 330. Gangrene Resulting From Injury.
- 331. Glanders.
- 332. Heart Disease.
- 333. Heat Stroke And Sun Stroke.
- 334. Hemorrhage.
- 335. Hernia.
- 336. Independent Contractor Doing Extra Work.
- 337. Infection From Various Causes.
- 338. Influenza.
- 339. Insanity.
- 340. Intoxication.
- 341. Ivy Poisoning.
- 342. Landslide And Snowslides.
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- 344. Mental Shock.

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- 345. Misunderstood Orders.
- 346. Neurosis.
- 347. Paralysis.
- 348. Pneumonia.
- 349. Ruptures.
- 350. School Teacher Injured Or Killed.
- 351. Self Inflicted Injuries.
- 352. Suicide.
- 353. Testing Racing Motorcycle.
- 354. Tetanus.
- 355. Toxic Amblyopia.
- 356. Tuberculosis.
- 357. Typhoid Fever.
- 358. Ulcers.
- 359. Unintentional Injury By a Fellow Employee.
- 360. Using Elevator Contrary To Instructions.
- 361. Using Machinery Other Than That Employed To Use.
- 362. Volunteers.
- 363. Watchman.
- 364. Window Cleaner Falling From Ledge.

§ 262. "Arising Out Of" and "In The Course Of". In General.—Compensation for disability is conditioned in most of the American Workmen's Compensation Acts and in the English Act upon the disability being due to an accidental injury which arose "out of" and "in the course of employment."¹

North Dakota, Ohio, Pennsylvania, Texas,² Utah,³ West Virginia, and the Federal Act, use the phrase "in the course of employment;" Wyoming, "injured in hazardous employment;" and Wisconsin, "growing out of and incidental to the employment."⁴

1. Missouri, Illinois, Iowa, Kansas, Kentucky, Oklahoma, Nebraska, Tennessee, etc., *City of Chicago v. Industrial Comm.*—Ill.—, (1920), 127 N. E. 49, 6 W. C. L. J. 17; *Brown v. Bristol Last Block Co.*,—Vt.—, (1920), 108 Atl. 922, 5 W. C. L. J. 628; *Fassig v. State ex rel. Turner*—Ohio 116 N. E. 104, B. 1 W. C. L. J. 1458; *Stasmos v. State Indus. Comm.*,—Okla.—, (1921), 195 Pac. 762.

2. *Lumberman's Reciprocal Ass'n. v. Behnken*,—Tex. Civ. App.—, 226 S. W. 154, 7 W. C. L. J. 363.

3. *Twin Peaks Canning Co. v. Indus. Comm.*,—Utah—, 1921, 196 Pac. 853.

4. *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, 156 N. W. 143, 12 N. C. C. A. 793.

The two elements of this phrase are discussed in an Illinois case in which the court said: "The words 'arising out of' and the words 'in the course of' are used conjunctively. In order to satisfy the statute, both conditions must concur. It is not sufficient that the accident occur in the course of the employment, but the causative danger must also arise out of it. The words 'arising out of' refer to the origin or cause of the accident, and are descriptive of its character, while the words 'in the course of' refer to the time, place, and circumstances under which the accident takes place. *Fitzgerald v. Clarke & Sons*, 1 B. W. C. C. 197; *Dietzen Co. v. Industrial Board*, 279 Ill. 11, 116 N. E. 684. By use of these words it was not the intention of the Legislature to make the employer an insurer against all accident injuries which might happen to an employee while in the course of the employment, but only for such injuries arising from or growing out of the risks peculiar to the nature of the work in the scope of the workman's employment or incidental to such employment, and accidents in which the employee is exposed in a special degree by reason of such employment. Risks to which all persons similarly situated are equally exposed and not traceable in some special degree to the particular employment are excluded."⁵

In a Minnesota case where a teacher was assaulted on her way home from school the court said; "Without determining whether the injuries to the teacher arose in the course of the employment it is held that they were not caused by accident arising out of the employment and that they are not compensable under the compensation act," the nature of the employment not being such as to naturally invite an assault."⁶

5. *Mueller Const. Co. v. Indus. Board*, 283 Ill. 148, 118 N. E. 1028, 1 W. C. L. J. 943; *Dietzen v. Industrial Board*, 279 Ill. 11, 116 N. E. 684; *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A. 310; *Morris & Co. v. Indus. Comm.*, —Ill.—, (1920), 128 N. E. 727, 7 W. C. L. J. 41; *Sparks Milling Co. v. Indus. Comm.*, —Ill.—, (1920), 127 N. E. 737, 6 W. C. L. J. 299; *Weiss Paper Mill Co. v. Indus. Comm.*, —Ill.—, (1920), 127 N. E. 732, 6 W. C. L. J. 307; *Kowalek v. N. Y. Consol. Ry. Co.*, —N. Y. App. Div.—, 128 N. E. 888, 7 W. C. L. J. 215, *Fournier's Case* —Me.—, (1921), 113 Atl. 270.

6. *State ex rel. v. District of Itasca County*, 140 Minn. 470, 168 N. W.

In speaking on this same subject, the Supreme Court of Massachusetts said: "An injury may be said to arise out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the condition under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it 'arises out of' the employment, but it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."⁷

In an Iowa case the court said: "But it does not suffice that he was injured while in the course of his employment. It must further appear that his injury arose out of such employment. The defendants were bridge builders who had charge of construction of county bridges in Story County. Deceased was employed by them. Decedent and others in such employment were by defendants lodged and boarded on the ground where the work was done. On the night of the accident the day's work had been finished, but the employees were in the boarding tent. They had got

555. 2 W. C. L. J. 661; *State ex rel. Duluth Brewing & Malting Co. v. District Court*, 129 Minn. 176 151 N. W. 912; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458.

7. *McNicols Case*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A. 306. See *Milliken's case*, 216 Mass. 293, 103 N. E. 898, L. R. A. 1916A. 337; *Sanderson's In re*, 224 Mass. 558, 113 N. E. 355. *Continental Casualty Co. v. Indus. Comm.*—Cal. App.—(1920), 190 Pac. 849, 6 W. C. L. J. 434; *Brown v. Bristol Last Block Co.*, —Vt.—, (1920), 108 Atl. 922, 5 W. C. L. J. 628.

through washing the dishes and were sitting there until it was time to go to bed. While thus engaged the decedent came to his death from a stroke of lightning. Concede that he was in the course of his employment while thus in the tent awaiting his bed time, and still supervising other employees in getting ready for bed, and still there must be proof that the injury arose out of such employment. The burden is on the claimant. It is not discharged by creating an equipoise. It requires a preponderance. See *Eisentrager v. Railway*, 160 N. W. 311, L. R. A. 1917 B, 1245; *In re savage* Mass. 205, 110 N. E. 283.

"It is not enough for the applicant to say 'the accident would not have happened if I had not been engaged in this employment, or if I had not been in that particular place.' The applicant must go further and must say 'the accident arose because of something I was doing in the course of my employment, and because I was exposed by the nature of my employment to some peculiar danger.' In our opinion, the injury claimed for did not arise 'out of' decedent's employment."⁸

In a Kentucky case the court expressed itself as follows: "Many of the courts in this country, as well as in England, have experienced difficulty in determining when an accident arises 'out of' the employment. The words 'in the course of' employment have reference to the time, place, and circumstances while the words 'arising out of' the employment relate to the cause or source of the accident. The terms 'out of' and 'in the course of' are not synonymous, and if either of these elements is missing, there can be no recovery. The two questions are to be determined by different tests. The words 'out of' refer to the origin or cause of the accident, and the words 'in the course of' to the time place, and circumstances under which it occurred. So it has been said that an injury which occurs while an employee is doing what he might reasonably do at the time and place is one which arises 'out of and in the course of the employment.' L. R. A. 1916 A., 232.

"In *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458, it was held that an accident arises 'in the course of the employment' if it oc-

8. *Griffith v. Cole Bros.* 183 Ia. 415, 165 N. W. 577, 1 W. C. L. J. 368.

curs while the employee is doing what a man so employed may reasonably do in the time during which he is reasonably employed and at a place where he may reasonably be during that time, and it arises 'out of' the employment when it is something the risk of which may have been contemplated by a reasonable person, when entering the employment, as incidental thereto.⁹

Further light may be thrown on this subject by giving the view of the Ohio commission interpreting the class of act wherein it is necessary only for the injury to occur "in the course of the employment." "We have had occasion to consider the meaning of the words 'in the course of employment' as they are employed in the above-mentioned sections in a number of claims heretofore decided by us, and we have held repeatedly that in order to be compensable, the injury need not result from an accident if the injury is sustained while the employee is in the performance of services which he was employed to perform by his employer. It is true that we have not considered death from natural causes while in the course of employment, an injury sustained in the course of employment, and in claim No. 35163, where an employee was attacked by apoplexy or cerebral hemorrhage, from the effects of which he died, and where it appeared that the attack was not brought on by any extraordinary or unusual exertion on the part of the employee, we held that the death was due to natural causes and not to an injury in the course of employment. But the death of Anna Schwenlein was not due to natural causes. It was due to the malicious and felonious act of a fellow employee. That it was due to an injury cannot be questioned. The injury was sustained while the deceased was at work. We conclude that her death was caused by an injury while in the course of employment."¹⁰

In the conclusion the court in the Iowa case, *supra*, quotes with approval the following from page 73 Corpus Juris (W. C.): "In

9. Hollenbach Co. v. Hollenbach, 181 Ky., 262, 204 S. W. 152, 2 W. C. L. J. 493; See, also, Feda v. Cudahy Packing Co., 102 Nebr., 110, 166 N. W. 190, 1 W. C. L. J. 649; Pierce v. Boyer-Van Kuran Lumber & Coal Co., 99 Nebr. 321, 156 N. W. 509.

10. In re Schwenlein, 1 Bull. Ohio Ind. Com. 136.

determining whether an accident arose out of and in the course of the employment, each case must be decided with reference to its own attendant circumstances: and it has indeed been stated rather broadly but by eminent authority that argument by analogy is valueless."¹¹

Where an employee was killed by being struck with a bar of iron, which was pushed from the floor above by a workman in the employment of another contractor on the same building, the court said: "It remains to be considered whether the accident arose both 'out of and in the course of his employment.' For an accident to arise out of and in the course of the employment, it must result from a risk reasonably incidental to the employment. As was said by Buckley, L. J., in *Fitzgerald v. Clarke & Son*, (1908), 2 K. B. 796, 77 L. J. K. B. 1018. 'The words "out of" point, I think, to the origin and cause of the accident; the words "in the course of," to the time, place, and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words "out of, involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment. 'We conclude, therefore, that an accident arises 'in the course of the employment' if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time. That the findings of fact in the present case justified the conclusion that the accident to Bryant occurred 'in the course of' his employment is beyond dispute. We are also of opinion that the conclusion of the common pleas judge that the accident arose 'out of' the employment was likewise justified. We conclude, therefore, that an accident arises 'out of' the employment when it is something the risk of which

11. *Kitchenham v. Steamship Johannesburg*, (1911), A. C. 417, 27 T. L. Rep. 504, 4 E. W. C. C. 311; *Blair v. Chilton*, 8 B. W. C. C. 324; *Dietzen & Co. v. Industrial Board*, 279 Ill. 11, 116 N. E. 684.

might have been contemplated by a reasonable person, when entering the employment, as incidental to it. A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. And a risk may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the employment owing to the special nature of the employment." ¹²

The English writer Ruegg succinctly summarizes as follows the law on this subject, in the 8th edition of his work on Employers' Liability and Workmen's Compensation, p. 373-374: "1. That the onus of proving both that the accident arose out of and in the course of the employment, rests upon the applicant. 2. That the accident does not arise out of and in the employment if it is caused by the workman doing something entirely for his own purposes; or 3. The same result follows when the workman does something which is not part of his duty towards his employer, and which he has no reasonable grounds for thinking it was his duty to do. 4. The accident may arise out of and in the course of the employment, if the act which occasioned it, although not strictly in the scope of the workman's employment, is done upon an emergency. 5. It may be said to arise out of the employment if, it being the workmen's duty to do the act, the accident arises from his doing it in an improper manner. 6. It may arise out of and in the course of the employment, if occurring on the employer's premises, when the workman has not actually commenced his work, or after he has finished. 7. It may arise out of and in the course of the employment if, the workman's duties not being clearly defined, he may reasonably have thought it a duty to do the thing in the course of which the accident occurred. 8. It does not arise out of and in the course of the employment, if occasioned by the wilfully tortious act of a fellow servant, when the risk of such an act cannot be said to be one of the risks incidental to the service. 9. It may arise out of and in the course of the employment if, though occasioned tortiously, even wilfully, by the act of a third

12. *Bryant v. Fissell*, 84 N. J. L. 42, 86 Atl. 458, 3 N. C. C. A. 585.

party, the risk of injury from such acts is found to be one of the risks incidental to the employment."

§ 263. Accidents Sustained in Going to and from the Place of Employment.—A.—Going to Work in Own Conveyance.—

Where an employee was injured when his motorcycle collided with a street car while he was on his way to get certain materials needed in the course of the employment, it was held that the accident arose out of and in the course of the employment. The court saying that the going for the goods was strictly within his duties. The fact that he rode upon a motorcycle which he commonly used in performing errands and in going to and from his home does not alter the case. He had the right to use such instrumentalities as were best fitted to perform his master's work.¹³

Where an employee was struck and injured by an automobile while waiting to board a street car, in going from one job to another, it was held that the accident arose out of and in the course of the employment; the court saying: "We think it is clear from the record that the employment of the deceased was to go from place to place to trim trees, and that in the discharge of these duties it was not only necessary for him to supervise the work, but it was necessary, in the course of his employment, to proceed from one job to the other, adopting such means of locomotion as he might desire. * * * Being clearly of the opinion that the record warrants the conclusion that at the time of the injury the deceased was within the ambit of his employment, we also think that it is a justifiable conclusion that the accident can be fairly traced to his employment as a contributing and proximate cause. It is true that in going from one place to another, as was his duty, he naturally was compelled to assume risks not in any wise connected with the trimming, planting, and treating of shade trees. But his employment extended further than this and necessarily obliged him, in the discharge of his duties, to go from place to place, and in so doing to assume the risks of traffic upon the streets. Where employees are compelled during the course of their

13. *Coster v. Thompson's Hotel Co.*, 102 Neb. 585, 168 N. W. 191, 16 N. C. C. A. 905.

employment to travel about the streets, it does not seem to us to be unreasonable to say that the danger of being struck by street cars, automobiles, and traffic of every description should be taken account of. We think it must be said that the very nature of the occupation of the deceased itself exposed him to the unusual risk and danger of an accident of this nature."¹⁴

A claim adjuster was injured while riding on one of his employer's cars to the place of his employment, after serving a subpoena. In reversing an award in claimant's favor, the court said: "To be within the legislative intent, the work or occupation must subject the employee to the hazards contemplated by this law. The decedent was riding upon the car, not as an employee in the performance of a duty relating to the car, but was a passenger for his own personal convenience. He was subject to the same hazards as any other passenger in the car, and the hazard came, not because he was operating a railroad, but because he was riding in a car, and the hazards, so far as the accident is concerned, were no greater upon the car than they would have been upon a bus or any public place where people assemble. He was not necessary to or an incident to the operation of the car, and had no duty upon the car. * * * The mere fact that an employee is in the service of a railroad company does not bring him within the act; he must be engaged in the hazardous work, or in some way be subject to the hazards arising from the nature of the work."¹⁵

Ordinarily when an employee is injured while traveling to or from his place of work, and is not paid for the time consumed in going and coming, the means of conveyance not being furnished by the employer and the employee having departed from or not yet reached the employer's premises, the injury does not arise out of the employment.¹⁶

14. *Kunze v. Detroit Shade Tree Co.*, 192 Mich. 435, 158 N. W. 851, 15 N. C. C. A. 253.

15. *In re Brown*, 173 App. Div. 432, 159 N. Y. Supp. 1047, 15 N. C. C. A. 290.

16. *De Constantine v. Public Service Comm.*, 75 W. Va. 32, 83 S. E. 88, L. R. A. 1916A 329; *Leveroni v. Travelers' Ins. Co.*, 219 Mass. 488, 107 N. E. 349.

Where the duties of a collector of accounts for defendant required him to go to another town, and he was injured on his way there, his injury arose out of and in the course of the employment.¹⁷

An employee, who was engaged as a repairer of musical instruments, was permitted, but not obliged, to do work at his home, and on the morning in question he had been working in his own shop on work taken home the previous evening and he was injured by slipping on ice while going to take a car to go to his employer's store, it was held that he was not injured in the course of his employment, and the injury did not arise out of his contract of employment.¹⁸

Where a workman who had been engaged to load a van, was promised employment in unloading if he was there upon the arrival of the van, met with an accident while cycling to the place, it was held that the accident did not arise out of or in the course of the employment.¹⁹

A workman, having missed his work train, was on his way to get a pass in order to overtake the work train, when he was injured. It was held that the relation of master and servant did not exist at the time of the injury.²⁰

A city employee, while going to his place of work, fell because of a defective sidewalk, and suffered a broken kneecap. Blood poisoning set in and caused death. In allowing compensation the court said: "In the instant case, when the servant reported to his foreman and received his instructions for the day and proceeded to carry out these instructions by starting for the place where he was to work, we think the relation of master and servant commenced, and that in walking to the place of work the servant

17. In re Raynes, 64 Ind. App.—, 118 N. E. 387, 1 W. C. L. J. 562.

18. Indus. Com. v. Anderson, (Colo.), 169 Pac. 135, 1 W. C. L. J. 305, 15 N. C. C. A. 249.

19. Perry v. Anglo American Decorating Co., (1910), 3 B. W. C. C. 310; Slade v. Taylor, (1915), W. C. & Ins. Rep. 53, 15 N. C. C. A. 250.

20. Missouri, K. & T R. Co. v. Hendricks, 49 Tex. Civ. App. 314, 4 N. C. C. A. 114, 108 S. W. 745.

was performing a service growing out of and incidental to his employment.²¹

Where an employee is required to go to outside places to work and to return to the employer's office to report, he is at all such times acting in the course of his employment, and is entitled to compensation if injured by accident at such times.²²

An employee injured while going aboard or leaving his ship, using the proper means, is entitled to compensation, provided his injury arises out of such employment, but if he is injured on the dock he is not within the protection of the compensation acts.²³

Where a sailor was drowned while returning to his ship, after a trip on shore not connected with his employment, the accident was held not to have arisen out of the employment.²⁴

Where a miner sustained injuries on his way to work, it was held not to be an accident arising out of the employment.²⁵

A workman was given a return ticket to a dock railway and ordered to report on board a ship at seven o'clock the next morning. He made use of the ticket, and when crossing the gangway he fell between the dock wall and the ship and was injured. His pay would have commenced when he reported on board the ship. It was held that the giving of the ticket was merely a gratuitous act on the part of the employers and imposed no duty on the part of the employee to go by train, and that therefore the accident did not arise out of, nor in the course of the employment.²⁶

A conductor alighted from one of his employer's cars, when he was returning to work, and was struck and killed by another

21. *City of Milwaukee v. Althoff et al.*, 156 Wis. 68, 145 N. W. 238, 4 N. C. C. A. 110, L. R. A. 1916A 327.

22. *Coleman v. Guilfooy Cornice Wks.*, Cal. I. A. C. 1 Nat. Comp. Jour. (1914) 18, 7 N. C. C. A. 428; *Turgeon v. Fox Co.*, 1 Cal. I. A. C. D. (1914) 7, 7 N. C. C. A. 429.

23. *Boucher v. Olson & Mahoney Steamship Co.*, 1 Cal. I. A. C. D. (1914) 12, 7 N. C. C. A. 426; *Gardiner v. St. of Cal. Printing Office*, 1 Cal. I. A. C. D. (1914) 4, 4 N. C. C. A. 859.

24. *Hyndman v. Craig & Co.*, 44 Irish Law Times Rep. 11, 4 B. W. C. C. 438 (1910) 3 N. C. C. A. 273

25. *Anderson v. Fife Coal Co., Ltd.*, 1910 Court of Sessions, 8, 47 Scot Law Rep. 3, 3 B. W. C. C. 539, 3 N. C. C. A. 272.

26. *Nolan v. Porter & Sons*, 4 N. C. C. A. 113, 2 B. W. C. C. 106.

car. The court held that the accident did not arise out of and in the course of the employment, for the risks to which the employee was exposed on his way to work were in no way connected with his employment. The employer not providing a means of conveying the employee to work, he was therefore a mere passenger on the car.²⁷

An injury occurring while the employee was riding a bicycle, has been held to arise out of the employment, where the use of the bicycle was to further the master's business, which could be done better by the use of the bicycle. As where a salesman and collector while riding a bicycle in pursuit of his employment was kicked in the knee by a passing horse.²⁸ But if it is used merely to accommodate the workman, a different rule prevails. Where a workman, going from one farm to another on a bicycle to look after cattle, was injured while so riding, he was not injured by an accident arising out of the employment.²⁹

Where an employee was injured while boarding a street car to return from an errand, on which he had been sent by his employer, it was held that the injury was received in the course of the employment.³⁰

A janitor who was ordered to report back as quickly as possible after getting his lunch, took a street car and was injured on his way back to work. It was held that he was away from his place of employment for his own purposes and returning by a means of conveyance of his own choosing. His acts while away were in no way connected with his employment nor under the direction of his employer; and therefore not in the course of his employment at the time of the injury. The claim was disallowed.³¹

27. McCabe v. Brooklyn Heights R. R. Co., S. D. R. Vol. 8, pg. 407, — App. Div. N. Y. —.

28. McNiece v. Singer Sewing Mach. Co., (1911), S. S. 13, 48 Scot. L. R. 15, 4 B. W. C. C. 351.

29. Green v. Shaw, (1912), 1 I. R. 480 (1912) W. C. R. 25, 46 Ir. L. T. 18, 5 B. W. C. C. 573.

30. Brodie v. Reo Pac. Co., 1 Cal. Ind. A. C. 415 (1914), 12 N. C. C. A. 389; Wheeler v. Maryland Casualty Co., 3 Mass. Wkm. Comp. Cas. 433, 1914, 12 N. C. C. A. 389.

31. In re Frisch, Ohio Ind. Comm. No. 11, 38 (1915) 12 N. C. C. A. 389.

An employee was requested to meet his employer at a store on a holiday, and in order that he might get there at the allotted time, used his own automobile. While cranking the automobile he broke his arm. In denying compensation the commission held that the compensation act protected him while working at the place of his employment, but that while going to and from work, his risks were the same as those of the community and not those of the business in which he was engaged. The accident did not arise out of or in the course of his employment.³²

An employee used his own motorcycle going to and from jobs, with the knowledge and consent of his employer, receiving no extra compensation for its use. While cleaning the clutch of the motorcycle at the place of employment, his fingers were caught in the chain guard, resulting in traumatic amputation of the distal phalanges of two of his fingers. In affirming an award, based on a finding that the accident arose out of and in the course of the employment, the court said: "Clearly, if the motorcycle was only used for the convenience of the claimant in bringing him to and from his place of work, the case would not be within the act. But the evidence shows that from time to time it was used in the business in going to and from the work off the premises, and that at other times when it had been cared for during working hours, no question had been raised by the employer. It could not be used in the business unless kept in proper condition. The facts that the workman was engaged upon it near the place of business during working hours, and that it was frequently used in the business, do not make the findings of the commission unreasonable."³³

An employee sustained a fracture of the leg, as a result of a collision with a street car while riding his motorcycle. He was on his usual way from his home to the store where he was employed, and intended to stop at a market and buy fresh vegetables for his employer, according to his usual custom. It was held

32. *Graham v. Daly Bros.*, 2 Cal. I. A. C. 793, 1915, 12 N. C. C. A. 386; *Gordon v. Eby*, 1 Cal. I. A. C. D. (1914), 13, 4 N. C. C. A. 858; *Oldham v. Southwestern Surety Co.*, 1 Cal. I. A. C. D. (1914) 7, 7 N. C. C. A. 410.

33. *Kingsley v. Donovan*, 169 N. Y. App. Div. 828, 155 N. Y. S. 801, 12 N. C. C. A. 384.

that while the boy was going to work on the portion of the way between his home and the market he was not engaged in his employment, and that the risk resulting in the accident had no connection with the employment.³⁴

A fireman returning to work on a motorcycle after his midday meal collided with defendant's automobile and was seriously injured. It was held that the city street was not on the "premises of his employer," within the meaning of the Wisconsin Act (L. 1913, C. 599), and that the case did not therefore come under the compensation act.³⁵

A well borer was allowed to ride to and from work on his employer's time. His bicycle was struck by an automobile which resulted in a fracture of his leg. It was held that the accident arose out of and in the course of the employment.³⁶

A lawyer's clerk, who was also a court clerk, usually made the trip between the places of employment by train, but sometimes used his bicycle to his employer's knowledge and without his disapproval. One time on returning from the court on his bicycle he was struck by a motor car, sustaining injuries resulting in his death. Reversing the decision of the lower court, it was held that the use of his own bicycle was not at the direction of the employer, and that the road over which he was required to travel was not attended by any peculiar risk, nor was the bicycle such a dangerous article that its permitted occasional use made the employer liable for the consequences of an accident on the road. The accident did not arise out of the employment, and compensation was denied.³⁷

Compensation was allowed for the death of a barge captain, who was drowned in the night while returning from a cafe on shore and crossing intermediate barges to reach his own.³⁸

34. *Hummer v. Hennings*, 2 Cal. I. A. C. 857 (1915) 12 N. C. C. A. 384.

35. *Hornburg v. Morris*, 163 Wis. 31, 157 N. W. 556, 12 N. C. C. A. 383.

36. *Hiserman v. Garside*, 1 Cal. I. A. C. 516 (1914) 12 N. C. C. A. 383.

37. *Read v. Baker*, 32 T. L. R. 382, 60 Sol. J. 402, 140 L. T. 466, 12 N. C. C. A. 382.

38. *Countrymen v. Neuman*, 174 App. Div. 900, 159 N. Y. S. 1108; *Lazarick v. N. Y., New Haven & Hartford R. R. Co.*, 171 App. Div. 959, 155 N. Y. S. 1119.

An employee was injured while going to assist in unloading a steam shovel. He was riding his own motorcycle and was paid for the time in going to and coming from the place of employment. It was held that the accident arose out of and in the course of the employment.³⁹

§ 264. **Going from Work in Own Conveyance.**—An employee quit work, mounted his motorcycle and started for home. When riding down the street he collided with an automobile driven by another employee. He sustained injuries which resulted in his death. In holding that the accident did not arise out of or in the course of the employment, the court said: "To come within the term 'injury received in the course of employment' it must be shown that the injury originated in the work, and, further, that it was received by the employee while engaged in or about the furtherance of the affairs of the employer. If it be conceded that the injury originated in the work, it would still be necessary, in our opinion, to show that the employee was engaged in the furtherance of his employer's business."⁴⁰

An officer of a corporation was also employed in the capacity of looking after the collection of debts, and upon hearing that several debtors might be found at a certain hotel barroom, he proceeded there on an interurban car. After interviewing several debtors, he spent the evening at another hotel and at the Elks club rooms. At 11 p. m. discovering that he had missed the last interurban car, he hired a taxicab to take him home. While enroute to his home, the taxi stopped for gasoline and it was necessary for him to alight, and he was struck by another car, sustaining serious injuries. The board certified the above facts to the court with the question whether the accident arose out of and in the course of the employment. The court held that these were facts for the determination of the board and if the board

39. *Cummings v. Johnson Const. Co.*, (1916), 9 N. Y. St. Dep. Rep. 369.

40. *Indemnity Co. v. Dinkins*, (Tex. Civ. App.), 211 S. W. 949 (1919), 18 N. C. C. A. 1034, 4 W. C. L. J. 294; *In re Peter S. Winchester*, 2nd A. R. U. S. C. C. 262; *In re Julius Rosenberg*, 2nd A. R. U. S. C. C. 263; *Kirby Lumber Co. v. Scurlock*, —Tex. Civ. App.— (1921), 229 S. W. 975.

found that the business of the corporation detained him beyond the time for the last interurban car, then the board might find that the accident did arise out of and in the course of the employment, but if the business of the corporation was only incidental to a holiday afternoon and that social affairs detained him, then the board must find otherwise.⁴¹

An employee engaged in setting up machinery at different places for his employer was killed while on his way home to spend Sunday, when the jitney he had hired was struck by a train. Upon conflicting evidence as to whether or not the employee was to leave a job before it was finished for the purpose of spending Sunday in the City, the Court held that the evidence was not sufficient to justify a finding that the accident arose out of and in the course of the employment.⁴²

Where a workman on his way home attempted to board a train moving up an incline and was killed in the attempt it was held that the accident did not arise out of the employment.⁴³

Where a workman was injured by accident on a train on which he was riding while going home from work on a gratuitous pass, given him by his employer and which he was not obliged to use, it was held that the accident did not arise out of the employment.⁴⁴

An employee who was paid by the hour was furnished a bicycle for his work, and while riding home one evening on the main road he was run into and killed by a motor lorry. It was held that, since it was no part of his duty to ride home on the bicycle the accident did not arise in the course of his employment.⁴⁵

41. *In re Raynes*, 64 Ind. App.—, 118 N. E. 387, 1 W. C. L. J. 562, 16 N. C. C. A. 909.

42. *Inter. Harvester Co. of N. J. v. Indus. Bd. of Ill.*, 282 Ill. 489, 118 N. E. 711, 1 W. C. L. J. 762.

43. *Pope v. Hill's Plymouth Co.*, (1912), W. C. Rep. 15, 105 Law Times Rep. 678, 5 B. W. C. C. 175, 3 N. C. C. A. 273.

44. *Whitbread v. Arnold*, 1 B. W. C. C. 317, 99 Law Times 103 (1908) 3 N. C. C. A. 272.

45. *Edwards v. Wingham Agriculture & Imp. Co.*, (1913), W. C. & Ins. Rep. 642, 109 L. T. Rep. 50, 82 L. J. K. B. 998, 6 B. W. C. C. 511, 4 N. C. C. A. 115; *Cook v. Owners of "Montreal"*, 108 L. T. Rep. 164, 29 T. L. Rep. 233, 6 B. W. C. C. 220 (1913) 4 N. C. C. A. 115.

A city employee rode, home on the horse he was using. While taking it to a watering place, as was his custom, and before reaching the trough, the horse ran away and fatally injured the driver. It was not shown that he had any right to use the horse of his employer as a means of getting home, but to water the horse first was one of his duties. It was held that his injury arose out of and in the course of his employment.⁴⁶

Deceased was employed to collect cream and deliver butter. He used his own automobile, which overturned while passing another car and he was killed. As was his custom deceased was taking home butter to deliver on his way. The commission found that this fact was sufficient to prove that he was still performing a service in the course of his employment and compensation was allowed.⁴⁷

A deputy marshal, riding a motor cycle, was going home when he collided with a horse and buggy and was badly injured. The accident occurred a few moments before his day's work ended and while he was going home to see his wife, intending to return to the town hall and remain for the night. On his way he also intended to see about a street light which was reported as being out of order, this being part of his duties. The commission held that at the time of the accident the applicant was not performing any service growing out of, or in the course of his employment. He was going home for purposes of his own and the fact that he was going to see about a street light or that it was a few moments before his day's work ended, does not bring him within the provisions of the act.⁴⁸

An employee had quit work and left the premises. He was sitting in his buggy waiting for his son, when the horse took fright and ran away. It was held that the injury sustained in the runaway did not arise out of or in the course of the employment.⁴⁹

46. *Pigeon v. Employers' Liab. Assur. Corp., Ltd.*, 216 Mass. 51, 102 N. E. 932, 4 N. C. C. A. 516.

47. *Golden v. Delta Creamery Co.*, 2 Cal. I. A. C. 734, (1915), 12 N. C. C. A. 386.

48. *Eastman v. St. Comp. Fund*, 2 Cal. I. A. C. 350 (1915), 12 N. C. C. A. 387.

49. *In re McCall*, Ohio I. C. No. 121401, Nov. 4, 1915.

§ 265. **Going to and from Work in Conveyances Furnished by Employer.**—The Claimant was taking the garbage collection equipment, part of which belonged to the city, to its usual place of storage and care so that it should be ready for the work of the following day. We can hardly conceive of a service which grows out of and is incidental to his employment as a garbage collector if this is not such a service.⁵⁰

Two employees of a tobacco company were killed when an automobile, which was furnished in accordance with the terms of the contract of employment, skidded and collided with a tree. In deciding that the injury resulted from an accident arising out of and in the course of the employment, the court stated the established rule to be as follows:

“That the employer’s liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right permitted, to use by virtue of that contract, *Donovan’s Case*, 217 Mass. 78, 104 N. E. 431 Ann. Cas., 1915 C, 778. * * * Although the decedents, at the time of the accident, had not actually commenced their work upon the tobacco plantation of the defendant company, it is plain that their transportation was a part of the contract of employment with this defendant. When they were injured they were not passengers, paying a stipulated fare for the conveyance to their work. The automobile which skidded and caused the accident in question was furnished and paid for by the defendant company. The relation that then existed between the women and the Sumatra Tobacco Company was that of master and servant, and not that of carrier and passenger. At the time they were injured they were laborers in the employ of the tobacco company. *Pigeon v. Lane*, 80 Conn. 240, 67 Atl. 886, 11 Ann. Cas. 371; *Killduff v. Boston Elevated Railway*, 195 Mass. 308, 309, 81 N. E. 191, 9 L. R. A. (N. S.) 873. This being so, the case is like *Swanson v. Latham et al.*, 92 Com. 87, 101 Atl. 492, in which we stated that: ‘An in-

50. *City of Milwaukee v. Fera et al.*, 170 Wis. 348, 174 N. W. 926.

jury received by an employee while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment.' ”⁵¹.

Where a brewing Company's solicitor was driving to a place where he contemplated continuing an interview begun earlier in the day regarding certain matters connected with his employment, the automobile, which he was driving and which was furnished by his employer for use in the business, collided with a pile of bricks and turned over killing the solicitor, the court said: "We are of the opinion that * * * an inference can be drawn that Mr. McMinn, at the time of his accident, was on his way to the place of business of Perrigo, in the course of his employment, and that the accident arose out of and in the course of his employment." ”⁵²

While an employee was waiting for a street car on his way to work, his employer drove up in a Ford truck and requested the employee to get on the truck and go with him to the pipe yard to get some pipe and collect other pipe to take to the place where they were installing a sewer. While en route, the automobile was struck by a street car, injuring the employee. The court held that the injury occurred while the employee was performing an act which was necessarily incident to the employment and was acting at the direction of the employer. It did not matter that the accident happened before they arrived at the place where the main work of the employment was to be done. An injury may occur within the course of the employment and arise out of it even though it happen while the employee is on his way to and from

51. *Scalia v. American Tobacco Co. et al., and Salia v. Same*, 105 Atl. 346, 3 W. C. L. J. 230, 93 Conn. 82; *Dominquez v. Pendoia*, —Cal. App.—, (1920), 188 Pac. 1025, 6 W. C. L. J. 3; *In re Lee Madero*, 3rd A. R. U. S. C. C. 174; *In re Jacob D. Snider*, 3rd A. R. U. S. C. C. 175; *In re Richard v. Tyler*, 2nd A. R. U. S. C. C. 273; *Central Const. Corp. v. Harrison*, —Md. App.—, (1920), 112 Atl. 627.

52. *McMinn v. C. Kern Brewing Co.*, 202 Mich. 414, 168 N. W. 542, 17 N. C. C. A. 957.

his usual place of employment or while doing an act that is necessary to, or an incident of the employment.⁵³

Applicant was away from his place of employment and contemplated taking a stage back to the place of his employment. When starting back he met a superintendent of the mine where applicant worked, who offered to let him ride back on trucks of their employer if he would assist in loading the trucks, and the owner would pay him for his labor. The offer was accepted, and on the way back applicant was injured. In denying compensation the court said that while riding back on the truck the employee was engaged in no service of his employer, and that the risk assumed was no different than if he had ridden back in the stage. The accident did not arise out of and in the course of the employment.⁵⁴

An errand boy was injured while returning from an errand. The employer furnished a bicycle for use in this connection. When returning the boy caught hold of a passing truck and was thrown in front of another car when the truck suddenly turned a corner. The court held that the accident arose out of and in the course of the employment.⁵⁵

Where a nurse was required to use a bicycle in going to visit patients, and sustained injuries while en route, it was held that the accident was not one arising out of the employment.⁵⁶

Compensation was denied for the death of an employee, who was killed while attempting to board a moving train to go to report to his employer. The court held that the deceased added peril to the usual risk connected with his employment when he attempted to board the moving car. The accident did not arise out of and in the course of the employment.⁵⁷

53. *Scully v. Indus. Comm. of Ill.*, 284 Ill. 567, 120 N. E. 492, 3 W. C. L. J. 30.

54. *Boggess v. Indus. Acc. Comm.*, 176 Cal. 534, 169 Pac. 75, 1 W. C. L. J. 293, 15 N. C. C. A. 268; *Shultz v. Champion Welding & Mfg. Co.*, — N. Y. App. Div.— (1921), 130 N. E. 304.

55. *Beaudry v. Watkins*, 191 Mich. 445, 158 N. W. 16, 15 N. C. C. A. 254; *Dennis v. White & Co.*, (1917), A. C. 479, W. C. & Ins. Rep. 106, 15 N. C. C. A. 294.

56. *Ince v. Reigate Education Committee*, (1916), W. C. & Ins. Rep. 278, 15 N. C. C. A. 250.

57. *Jibb v. Chadwick*, (1915), W. C. & Ins. Rep. 342, 15 N. C. C. A. 243.

An employee of a street railway company was killed while crossing the street from a car upon which he had returned to the car barns. The contract of employment did not provide for conveyance to and from work on the defendant's cars. In denying compensation the court held that the decedent was in no way connected with his duties at the time of the accident, and the hazard to which he was exposed was that of the commonality. The accident did not arise out of or in the course of the employment.⁵⁸

Where an employer, as a part of the contract of employment furnished a conveyance for use of the employee in going to and from work, and the employee sustained injuries during the trip it was held that the accident arose out of and in the course of the employment, the court saying: "The contract of employment between the decedent and the respondents required the decedent to work outside of the place of his residence, Willmantie, if his employers should so desire; and the respondents agreed that, while the decedent was at work in Stafford Springs, they, as a part of his contract of employment, would convey the decedent from his home to his work and back to his home each day in an automobile provided by them. The work began when the decedent reached Stafford Springs; the employment began when the decedent boarded the automobile at Willmantie, and continued during the trip and during the work, and on the return trip to Willmantie. Transportation to and from his work was incidental to his employment; hence the employment continued during the transportation in the same way as during the work. The injury occurred during the transportation, occurred within the period of his employment, and at a place where the decedent had a right to be, and while he was doing something incidental to his employment, because contemplated by it. The case falls clearly within the construction we have heretofore placed upon the terms of the statute 'arising in the course of employment.'"⁵⁹

58. *McCabe v. Brooklyn Heights R. Co.*, 177 App. Div. 107, 162 N. Y. Supp. 741; *Kowalek v. N. Y. Consol. R. Co.*, —App. Div.— (1920), 128 N. E. 888, 7 W. C. C. J. 215.

59. *Swanson v. Latham & Crane*, 92 Conn. 87, 101 Atl. 492; *Kowalek v. N. Y. Consol. R. Co.*, —App. Div.—, 179 N. Y. S. 637, 5 W. C. L. J. 434;

The applicant was going to his place of employment in a wagon furnished by the employer, when a shotgun, carried for the sole pleasure of another employee, exploded and so mangled the arm of the applicant as to necessitate amputation. Compensation was denied, the court holding that the accident bore no relation whatsoever to the nature of the employment. The employer did not direct that the gun be carried nor did he know it was loaded. The injured employee might have objected to the presence of the gun, or at least have seen that it was unloaded. Not doing so, he cannot shift responsibility to his employer.⁶⁰

An auditing clerk was traveling upon a train of his employer from his usual place of employment to an outside office to correct the books of the latter office. During the trip an accident occurred and the clerk alighted to assist, and when boarding the train he fell under the moving train, sustaining injuries which resulted in his death. It was held that in alighting to render assistance, the deceased was not performing any duty which devolved upon him arising out of his employment.⁶¹

Where an employee took his employer's horse and carriage home, in going to dinner, which he was not supposed to do, as he was to receive his dinner at the mill where he was working, and while at his home the fly nets became entangled and he climbed out on the shafts to straighten them when the horse kicked and he fell between the shafts, sustaining injuries from which he was incapacitated for a month, it was held that the accident did not arise out of and in the course of his employment, and compensation was denied.⁶²

An employee engaged as a plumber going from the place where he was engaged in his employment, back to the employer's

Lindstrom v. N. Y. C. R. Co., 174 N. Y. S. 224, 3 W. C. L. J. 514; also *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320, 12 N. C. C. A. 308, L. R. A. 1916E 584.

60. *Ward v. Indus. Acc. Com. of Cal.*, 175 Cal. 42, 164 Pac. 1123, 15 N. C. C. A. 223.

61. *N. W. Pac. R. Co. v. Indus. Com.*, 174 Cal. 297, 163 Pac. 1000, 15 N. C. C. A. 219.

62. *Wallace v. Duffus*, 31 Sheriff Ct. Rep. 262 (1915) (Eng.) 12 N. C. C. A. 375.

shop in a wagon that was furnished to him. He was found seriously injured in the roadway. The commission awarded compensation on the theory that the employee had been thrown from the wagon. The evidence which consisted wholly of medical testimony was to the effect that the organs of the body were in normal condition and that death was due to a hemorrhage. The Supreme Judicial Court reversed the decision, holding that there was no evidence to support such a finding, and that it was based merely upon conjecture which could not be allowed to stand.⁶³

Where an employee insisted upon riding upon a load of hay against the positive objections of the driver and contrary to the rules of the employer, and fell off, sustaining injuries, it was held that the accident did not arise out of and in the course of the employment.⁶⁴

Where the contract of employment included an agreement on the part of the employer to transport the workmen to and from work, and an employee was injured by the breaking down of the automobile used as the means of conveyance, it was held that the accident arose out of and in the course of employment.⁶⁵

The duties of an employee of an oil company were performed partly at the plant, and the remainder of the day he was in the field looking after business and collecting bills, etc., in an automobile furnished by his employer. His employment began upon reaching the plant in the morning and terminated when he reached home in the evening. While on the way to work one morning his car collided with a trolley car resulting in serious injuries to himself. It was held that, because his work did not terminate until he reached home in the evening, it could not be said that, as regarding coming to work in the morning, he could avoid coming under the general rule pertaining to accidents happening while the

63. *In re Sanderson*, 224 Mass. 558, 113 N. E. 355, 12 N. C. C. A. 374.

64. *Gonzales v. Lee Moor Contr. Co.*, 2 Cal. I. A. C. 325 (1915) 12 N. C. C. A. 373.

65. *Gilbert v. Employers' Liab Assur. Corp. Ltd.*, 1 Mass. W. C. C. 133 (1913) 12 N. C. C. A. 373.

employee was coming to and going from work. Compensation was denied.⁶⁶

Plaintiff was injured by the overturning of his employer's car in which he was being transported from his home to a place where he was to work. The plaintiff's duties as a plasterer required him to go from one job to another and upon this occasion the employer told him that certain materials were needed at the next job and he would send a car to transport him and the materials to the new job. The board in discussing the contention of defendant that the accident did not arise out of and in course of the employment in which the general rule that an employee, when on his way to work is not in the course of his employment, was relied upon, said that while the rule might be general it was by no means a universal rule, because coexistent with it is another general rule that where workmen are employed to work at a certain place by the employer, as a part of their contract of employment, the period of service continues during the time of transportation. "In this case it appears from the evidence, without any dispute, that the plaintiff was not riding in the automobile at his own solicitation or for his own convenience or purpose, but that he was riding at the solicitation of the defendant under his direction and for the purpose of the furtherance of his interests. Under such a state of facts, the board holds that the plaintiff's injuries were caused directly by an accident arising out of and in the course of his employment."⁶⁷

Compensation was denied for the death of a superintendent caused by the overturning of his employer's automobile, in which he was riding to work. The automobile of the superintendent was broken and he asked permission to ride with the contractor in the latter's car. It was held that there was no evidence to take the case out of the general rule that accidents on the way to and from work are not compensable.⁶⁸

Where an employer furnished his own wagon to transport his employees from the city to the place of employment and the horse

66. *Zbinden v. Union Oil Co. of California*, 2 Cal. Ind. Acc. Com. 590 (1915) 12 N. C. C. A. 371.

67. *Yeargin v. Bode*, Ind. I. Bd. No. 62, 1916, 12 N. C. C. A. 371.

68. *Sampo v. Yellow Aster Mining and Milling Co.*, 2 Cal. I. A. C. 530 (1915) 12 N. C. C. A. 370.

ran away injuring one of the employees, it was held that the accident arose out of and in the course of the employment. The commission saying that the moment the employee stepped into the employer's conveyance he was on the premises within the meaning of the Compensation Act.⁶⁹

An employee fell off of one of his employer's wagons on which he was riding to work and died as the result of the injuries thereby sustained. The employer did not furnish transportation to its employees in going to and from work. The employee had not reported for work at the time the accident occurred. It was held that the injury was not sustained in the course of the employment.⁷⁰

A bricklayer refused to work unless a conveyance was furnished to and from the depot, so the employer agreed to furnish a truck. While making a trip to the depot the truck went into the ditch and claimant was thrown out and injured. The Court of Appeals said: "The Industrial Commission properly held that the injuries arose out of and in the course of Littler's employment. The vehicle was provided by the employer for the specific purpose of carrying the workmen to and from the place of the employment in order to secure their services. The place of the injury was brought within the scope of the employment because Littler when he was injured was 'on his way * * * from his duty within the precincts of the company. * * * The day's work began when he entered the automobile in the morning and ended when he left it in the evening. The rule is well established that in such cases compensation should be awarded.'"⁷¹

A workman employed in the canal zone was injured while riding home from work on a labor train. It was held that he was injured in the course of his employment.⁷²

Where an employee was injured while driving his employer's wagon back to the place of employment after making a delivery

69. *Oldham v. Southwestern Surety Co.*, 1 Cal. I. A. C. D. (1914) 7, 7 N. C. C. A. 425.

70. *In re Schmitt Ohio Ind. Com.*, (1914), 7 N. C. C. A. 415.

71. *Littler v. Geo. A. Fuller Co.*, 223 N. Y. 369, 119 N. E. 554, 16 N. C. C. A. 901.

72. *In re Claim of William Gerow*, Op. Sol. Dep. C. & L. (1915), 282.

for his employer, it was held that the injury resulted from an accident arising out of and in the course of the employment.⁷³

An employee engaged to load and unload a barge was drowned while riding on the barge to the place where it was to be unloaded. It was held that the accident arose out of the employment.⁷⁴

Where the contract of employment entitled a waitress to ride in her employer's hotel bus while on personal errands during her off hours and she was injured by the negligence of the chauffeur while returning with him to report for duty, such injury did not arise in her employment, so as to make her and the chauffeur fellow servants and require her to proceed under the compensation law.⁷⁵

Where a boy left his work and took a government skiff to go across a river for some reason unknown to anyone but himself, it was held, in the absence of any evidence to the contrary, that he was doing something incidental or necessary to his occupation and that the accidental injury which he suffered arose out of and in the course of his employment.⁷⁶

A section hand was injured when he jumped from a burning car while returning to work. The car was furnished by the employer as a means of conveying his workmen to their place of work. It was held that the accident arose out of and in the course of the employment.⁷⁷

Section hands, who are furnished handcars for transportation to and from work, sustaining injuries while enroute, even though the homeward trip is begun after the day's working hours are over, are still within the course of their employment.⁷⁸

73. *White v. East St. Louis Ry. Co.*, 211 Ill. App. 14, 17 N. C. C. A. 938.

74. *Rideout Co. v. Pillsbury*, 173 Cal. 132, 159 Pac. 435, 12 N. C. C. A. 1032.

75. *Roth v. Adirondack Co.*, 183 N. Y. S. 717, 6 W. C. L. J. 557.

76. *Re Walter Webb*, Op. Sol. Dep. L. 336.

77. *Potts v. Lehigh Valley R. Co.*, 4 N. Y. St. Dep. Rep. 421.

78. *Cicalese v. Lehigh Valley R. Co.*, 69 Atl. 166, 75 N. J. L. 897; *Arkadelphia Lbr. Co. v. Smith*, 78 Ark. 505, 95 S. W. 800; *Wilson v. Banner Lbr. Co.*, 32 So. 460, 108 La. 590.

Where a farm laborer was permitted to use a horse of his employer to take his personal belongings to the place of his employer, and the horse became frightened by a motor and the man was seriously injured, compensation was denied, the court holding that he was using the horse merely as a license, and that when an employer permits an employee to ride in his conveyance without any obligation on his part to do so the employer is not liable for injuries received on the trip.⁷⁹

Where an employee at his request was furnished a bicycle to ride to and from work, and was killed when he collided with a motor car on his way home, it was held that the accident did not arise out of the employment, even though the employee would not accept the employment unless provided with a bicycle.⁸⁰

Deceased was killed by a current of electricity received from a third rail while waiting to take a train home. "The deceased was entitled to journey from his work free of charge upon the cars of the appellant, and while so traveling would have been in the course of his employment, *Russell v. H. R. R. Co.*, 17 N. Y. 134; *Ross v. N. Y. C. & H. R. R. Co.*, 5 Hun, 488; *Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36; *McLaughlin v. Interurban R. R. Co.*, 101 App. Div. 134, 91 N. Y. Supp. 883. The deceased was also entitled to a reasonable opportunity, after his work was done, to remove himself from the premises of his employer. *Pope v. Merritt & Chapman Derrick & Wreckage Co.*, 177 App. Div. 69, 163 N. Y. Sup. 655; *Bylow v. St. Regis Paper Co.*, 179 App. Div. 555, 166 N. Y. Supp. 874. The 10 minutes, which elapsed between the moment when he gave in his time and the moment of the accident, was a reasonable time during which to stay upon the premises of his employer waiting to take the next train home. Therefore, whether the accident happened while the plaintiff was thus waiting, or after his homeward journey had begun, he was in either case, under the authorities

79. *Whitefield v. Lambert*, (1915), 8 B. W. C. C. 91, 12 N. C. C. A. 905; *Whitebread v. Arnold*, (1908), 99 L. T. 103, 1 B. W. C. C. 317; *Nolan v. Porter & Sons*, (1909), 2 B. W. C. C. 106; *Henson v. Standard Oil Co.*, 1 Cal. Ind. A. C. part 2, 383, 12 N. C. C. A. 379.

80. *Edwards v. Wingham Agri. Implmts. Co.*, (1913), 6 B. W. C. C. 511.

cited, unless guilty of some affirmative act removing him therefrom, still in the course of his employment when death overtook him. The case was made one of a continuing employment, so that the burden of proving a cessation thereof fell upon the appellant. That burden was not successfully borne. Upon the question whether the accident arose out of the employment it is sufficient to cite authority for the proposition that accidents occurring to employees while traveling to and from their work in an automobile provided by their employer arise, not only in the course of the employment, but from hazards incident thereto. *Matter of Little v. Fuller Co.*, 223 N. Y. 369, 119 N. E. 554. Therefore I think the award should be affirmed."⁸¹

The court in the syllabus to a recent Louisiana case said: "Where, under a contract of employment, an employee is carried forth and back, on a working train and is under the orders of his foreman, and is paid from the time that he boards the train in the mornings, until his return to the starting point, and detrainment, in the evening, and where, upon a particular occasion, the train is stopped upon the return trip and he gets off and renders a service required by the foreman, and, being ordered to get on again, loses his life in the attempt so to do, his parents in default of wife or child, become entitled, under Act No. 243 of 1916, amending and re-enacting section 8 of Act. No. 20 of 1914, to recover compensation equal to 50 per cent, during 300 weeks, of the wages that he was receiving at the time of his death, and that, notwithstanding that the accident may have been attributable to the decedent's own negligence, or may have resulted from a risk, which under the general law of master and servant he might be held to have assumed."⁸²

81. *Kowalek v. N. Y. Consolidated R. Co.*, (Dec. (1919), 179 N. Y. S. 637, 5 W. C. L. J. 434 10 App. Div. 160; *Lannon v. Interborough Rapid Transit Co.*, 184 N. Y. S. 588, 7 W. C. L. J. 90; *Indian Creek Coal Mining Co. v. Wehr*, —Ind.— (1920), 128 N. E. 715, 7 W. C. L. J. 47; *Harrison v. Cent. Const. Corp.*, —Md. App.—, 108 Atl. 874, 5 W. C. L. J. 534.

82. *Farris v. Louisiana Long Leaf Lbr. Co.*, —La.—, 86 So. 670, 7 W. C. L. J. 292.

Employees who rode on a truck going a different way than the one upon which they were supposed to ride were not injured in the course of their employment.⁸³

Death was not due to an accident arising out of the employment, where the day's work had terminated, before deceased boarded a boat, chartered at the expense of the government, for the purpose of leaving the yards, even though the place of his employment could not be reached otherwise than by boat, since the contract of employment did not contemplate that the time consumed in going to and coming from work should be included in the day's work.⁸⁴

As a general rule an injury suffered by an employee while going to or returning from work does not arise out of the employment. An injury sustained while riding to the place of employment in a conveyance furnished by the employer in compliance with one of the terms of the contract of employment, for the use of employees, but in which the workman was not directed or required to ride, does not arise out of the employment, where it appears that the injury was received before, and not during, the hours of the workman's service, when his employer had no control over him and before the beginning of the period covered by his wages.⁸⁵

§ 266. **While Walking to and from Work.**—Where a railroad employee, who had neglected to bring his dinner with him as was his usual custom, received permission to go home for his dinner, and in proceeding along the right of way was struck and killed by a train, it was held that the relationship of employer and employee had ceased, and that the accident was not one arising out of or in the course of his employment. The employee was on a mission of his own and the fact that he was on the premises of

83. *United Disposal & Recovery Co. v. Indus. Comm.*; *United Engineering Co. v. Same*, (two cases), — Ill. — (1920), 126 N. E. 183, 5 W. C. L. J. 682.

84. *Rausch v. Standard Shipbuilding Corp.*, — N. Y. — (1920), 181 N. Y. 513, 6 W. C. L. J. 92.

85. *Nesbitt v. Twin City Forge & Foundry Co.*, — Minn. — (1920), 177 N. W. 131, 6 W. C. L. J. 66; *Strohl v. Eastern Penn. Rys. Co.*, — Pa. — 1921, 113 Atl. 62.

his employer was immaterial as this course was of his own choosing in preference to a road running in the same direction. The burden of proof resting upon the party seeking to show the connection between the employment and the accident was not discharged.⁸⁶

The master of a schooner was returning to his boat from ashore, where he went on business of the ship, when he stepped upon an orange peeling and fell, and permanently injured his hip. It was held that, while the injury arose in the course of the employment, it did not arise out of the employment, and compensation was denied.⁸⁷

An employee was struck and injured by a train when going to his bunk house. There were two ways of reaching the bunkhouse, one of which was over the right of way which the employee chose of his own volition. It was held that this accident came within the settled rule "that injuries sustained by an employee while going to or returning from his day's work, when there is no contract of transportation, are not to be regarded as arising out of or received in the course of his employment."⁸⁸

Nor could the employer confer a right upon the employee to use tracks over which he had no control, where the employee was not paid for the time required to reach his home.⁸⁹

An employee, while walking down a railroad on his way to the place of his employment, was injured by a train striking him. This was the usual route to work, and the employee's time began from the time he left home. It was held that the accident occurred when the deceased was on duty in the line of his employment, and that the accident arose out of the employment.⁹⁰

A car inspector was killed while crossing the track of another company. His time in emergency call began from the time he left

86. *Hills v. Blair et al.*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409.

87. *Chapman v. John Pearn* (owners of), 9 B. W. C. C. 224, 12 N. C. C. A. 368.

88. *Guastelo v. Mich. Cent. R. Co.*, 194 Mich. 382, 160 N. W. 484, 15 N. C. C. A. 241; *Orsinie v. Torrance*, — Conn. — (1921), 113 Atl. 924; *Mason v. Alexandre et al.*, — Conn. — (1921), 113 Atl. 925.

89. *Bell's Case*, — Mass. — (1921), 130 N. E. 67.

90. *Porritt v. Detroit United Ry.*, 199 Mich. 200, 165 N. W. 674, 1 W. C. L. J. 397, 15 N. C. C. A. 241.

home and continued until he returned. On the occasion when the accident happened he was responding to an emergency call. In holding that the accident arose out of and in the course of the employment, the court said: "The decedent's work under the arrangement was emergency work, and its very character was such as to require him to report for duty at the earliest moment possible, and that he was doubtless expected to take the shortest and most direct route, though such route might expose him to dangers not present in one more circuitous, and, therefore, that his employer should be held to have anticipated such an accident as happened."⁹¹

Compensation was denied a widow for the death of her husband, who was killed on his way home from work. The employee chose to travel on the railroad instead of other ways which led in the same direction. The employer allowed pay for the time necessary in coming to and going from work. It was held that the accident did not arise out of and in the course of the employment, there being no evidence to indicate an agreement between the railroad company and the defendant as to the use of the railroad as a foot path by the latter's employees.⁹²

Where an employee was injured while going to work, walking along a railroad, compensation was denied in the lower court, the judge holding that by walking along the railroad, when there were two less hazardous paths, the employee added peril to his employment. On appeal it was held that such choice on the part of the employee did not make the accident one not arising out of the employment.⁹³

Compensation was denied for the death of an employee who was killed while passing along a railroad track, not in the "usual passage way of 8 ft. in width between the tracks," evidently going

91. *In re Maroney*, 64 Ind. App., —, 118 N. E. 134, 15 N. C. C. A. 242, 1 W. C. L. J. 356.

92. *Whittall v. Staveley Iron & Coal Co., Ltd.*, (1917), W. C. & Ins. Rep. 202, 15 N. C. C. A. 243; *In re Fumicello*, 219 Mass. 488, 107 N. E. 349, 15 N. C. C. A. 245; *Hadwin v. Shepherd*, (1915), W. C. & Ins. Rep. 503, 15 N. C. C. A. 245; *Mazeffe v. Kan. City Terminal Ry. Co.*, —Kan.—, (1920), 189 Pac. 917, 6 W. C. L. J. 159.

93. *Fox v. Rees & Kirby, Ltd.*, 1916 W. C. & Ins. Rep. 339, 15 N. C. C. A. 243.

to or from work, and it was held that the accident did not arise out of decedent's employment. It not having been shown that his employment required his presence on the track.⁹⁴

An employee, who was engaged in work in an ice house, was drowned on his way home when he was crossing the ice pond, which was the most direct route to his home. The pond was on the premises of the employer and under his control. In affirming a judgment which found that the accident arose out of and in the course of the employment, the court said: "While the employee's work for the day had been finished and he was on his way home at the time of the fatal accident, still it is settled that an injury to a workman may arise out of and in the course of his employment even if he is not actually working at the time of the injury." The court said that the finding that the pond was in the control of the employer and that the crossing over it on the ice was "the reasonable and customary way" for deceased to reach his home, and that he and other employees who lived in the same direction "crossed it this way regularly," warranted the further finding that the injury occurred in the course of the employment.⁹⁵

Where an employee, who was allowed to take work home, but was not required to do so, sustained injuries, by falling on ice when attempting to dodge an automobile while waiting to board a street car on his way to work, compensation was denied, the court holding that the accident did not arise out of nor in the course of the employment.⁹⁶

Where an employee slipped and fell while walking from one place of employment to another it was held that the accident arose out of and in the course of the employment. The court said: "It is enough to entitle a workman to compensation if he can say that on the occasion when he was injured by a peril of the street

94. *Siemientkowski v. Berwind White Coal Co.*, (N. J. L.) 92 Atl. 909, 14 N. C. C. A. 132.

95. *In re Stacy*, 225 Mass. 174, 114 N. E. 206, 15 N. C. C. A. 244.

96. *Indus. Comm. of Colo. v. Anderson*, (Colo.), 169 Pac. 135, 1 W. C. L. J. 305; *In re Killian Delebar*, 2nd A. R. U. S. C. C. 266; *In re Alva J. Norman*, 2nd A. R. U. S. C. C. 276.

his duty to his employer took him to that street, though the occasion may have been of a rare and exceptional character.⁹⁷

Deceased was employed as a procurer of samples of fat for his employer. It was customary upon such occasions for him to procure samples, and if he had time, to return to the plant before 6 p. m., and if he did not have time, to bring them the following morning. On the evening of the accident causing deceased's death he had procured samples and proceeded towards his home, when he was struck by a street car and killed. The court held that at the time of the accident deceased was not performing any mission for his employer. He had completed his work for the day. It was true that he had in his possession samples to be taken to the plant in the morning; but if he did retain possession of the samples at the time of the accident he did so for his own convenience, and that fact did not contribute in any way to his injury. The accident did not arise out of and in the course of the employment.⁹⁸

A workman injured on a highway on his way to work is not injured in the course of his employment.⁹⁹

A watchman, returning from work, was injured after alighting from a labor train and while walking along the railroad track. There was no other means of reaching a highway leading to his home. It was held that he was injured in the course of his employment.¹

An employee in the reclamation service was killed while walking along a railroad track when a train of that service struck him. It was held that the accident arose out of the employment.²

"The principal question here argued is whether Miller's accident arose out of and in the course of his employment. His work

97. *White v. W. & T. Avery, Ltd.*, 1915 W. C. & Ins. Rep. 594, 2 Sc. L. Times 374, 15 N. C. C. A. 251.

98. *N. K. Fairbanks Co. v. Industrial Comm.*, 285 Ill. 11, 120 N. E. 457, 17 N. C. C. A. 948.

99. *In re Claim of Gilkey*, Op. Sol. Dep. C. & L. (1915), 288; *In re Harry Scherer*, 3rd A. R. U. S. C. C. 175.

1. Op. Sol. Dep. C. & L. (1915), 309.

2. *In re claim of J. Schlechter*, Op. Sol. Dep. C. & L. (1915), 331.

in the roundhouse was completed at 4 o'clock, and the evidence tends to show that he could take a street car to his home and thus avoid walking down the tracks in the yard of defendant in error, but it also appears by the weight of the evidence in the record that there was a custom on the part of many of the employees to go down the tracks to take a train, and that this custom was known to the officials of the railway company who were in charge of the work at the roundhouse. This court has held that an injury occurring to an employee while on his way to or from his work may or may not arise out of and in the course of the employment, depending upon the special facts of the particular case. *Fairbank Co. v. Industrial Com.*, 285 Ill. 11, 13, 120 N. E. 457, 458. The court said in that case:

'When work for the day has ended and the employee has left the premises of his employer to go to his home the liability of the employer ceases, unless after leaving the plant of the employer the employee is incidentally performing some act for the employer under his contract of employment.'

'It is clear from his record that the accident occurred on the premises of the employer, as that word is ordinarily understood. One of the controlling factors in determining the question here under consideration is whether the employee at the time of the accident was within the orbit, area, scope, or sphere of his employment.'

'The usual rule followed in workmen's compensation cases appears to be that a man's employment does not begin until he has reached the place where he is to work or the scene of his duty and does not continue after he has left the premises of his employer (*Bradbury on Workmen's Comp.* [3d Ed.] 468), and it is ordinarily held that if an employee is injured on the premises of the employer in going to or from work he is entitled to compensation for such injuries (1 *Honnold on Workmen's Comp.*, Par. 122; *Bradbury on Workmen's Comp.* [3d Ed.], 473, and authorities cited). The employment is not limited to the exact moment when the workman reaches the place where he begins his work or to the moment when he ceases that work. It necessarily includes a reasonable amount of time and space before and after ceasing actual employment, having in mind all the circumstances connected with

the accident. Boyd on workmen's Comp. Par. 486. Whether an employee in going to or from the place of his employment is in the line of his employment will depend largely on the particular facts and circumstances of each case. There must necessarily be a line beyond which the liability of the employer cannot continue, and the question where that line is to be drawn has been held to be usually one of fact. Elliott on Workmen's Comp. Acts (7th Ed.) 41. The area of an employee's duty is much more readily ascertained in some cases than in others. Where the premises are confined to a single building or plant or inclosure it is usually held that the accident occurring on the premises arises out of and in the course of the employment, but when the accident occurs on the right of way of a railroad, and the right of way extends for miles with the main track line and for a considerable distance on the switch tracks or in the yards, it is much more difficult to decide. In the recent case of *Schweiss v. Industrial Com.*, 292 Ill. 90, 126 N. E. 566, this court had occasion to review numerous authorities bearing on this question, and the cases there cited will illustrate how different courts have viewed this question. We will not attempt here to refer to those cases in detail, but simply cite the opinion which shows the bearing that such cases have on the question here involved. Some additional authorities, however, may help to throw light on the question.

"An accident happened to a workman employed in one of the departments of the employer's oil works when he was going to his work on a path on the employer's premises provided for the use of the workmen, although at the time of the accident the nearest building belonging to the works was 80 yards away and his own working place was 300 yards distant. It was found that the accident arose out of and in the course of the employment. *Nicol v. Young's Paraffin Oil Co.*, 52 S. L. 354.

"An accident to miner was held to arise out of and in the course of his employment where, while proceeding above the ground to his work, he fell and broke his leg on the rails belonging to the employer leading to the doorway of a horizontal passage by which the mine was entered, at a spot some 13 feet from the doorway. *Mackenzie v. Coltness Iron Co.*, 6 Sess. Cas. (5th Series) Scot. Court of Session, 8.

“Where a miner at the end of his day's work changed his clothes, and, still carrying a miner's lamp, started towards the bottom of the shaft with the intention of ascending to the top, and about 200 feet from the room where he had been at work and about half a mile from the bottom of the shaft one of his eyes was put out by coming in contact with a piece of slate hanging from the roof, it was held that the accident arose out of and in the course of his employment. *Sedlock v. Carr Coal Co.*, 98 Kan. 680, 159 Pac. 9, L. R. A. 1917B, 372.

“An employee who was injured while going down in an elevator in the building of his employer after the whistle blew to cease work was held to be injured in the course of his employment. *Nelson v. Aetna Life Ins. Co.*, 12 N. C. C. A. 660, note.

“A stationary engineer, after the whistle had sounded for quitting work for the day, jumped over a pile of lumber to make a short cut out of the factory and fell, breaking his ankle. It was held that the injury arose out of the employment. *Bennett v. Russell & Sons Co.*, 12 N. C. C. A. 659, note

“A laborer at work in a field was stopped by a threatened storm, and while going to his home across his employer's land to avoid the storm he stepped on a plank and sustained an injury. It was held that the accident arose out of and in the course of his employment. *Taylor v. Jones*, 1 B. W. C. C. 3.

“This court held in *Stephens Engineering Co. v. Industrial Com.*, 290 Ill. 88, 124 N. E. 869, that an injury to an employee caused by a fall from a fire escape which he attempted to descend for the purpose of reporting to the timekeeper at the close of his day's work arose out of and in the course of his employment, where it was customary for the workmen to use the fire escape as a means of descent and such use was known to the employer, although there was another way of leaving the place of work which the evidence tended to show would be safer than the fire escape.

“The great weight of authority appears to be to the effect that if the injured employee was on the premises of the employer in going from his work, leaving within a reasonable time, and following the customary or permitted route off the premises, the accident would be held to arise out of the employment. *Boyd on Workmen's Comp. Par. 486*. The leaving of the premises where one is

employed is so closely connected with his employment as to render it a necessary incident thereto. It was stated in *Terlecki v. Strauss*, 85 N. J. Law, 454, on page 455, 89 Atl. 1023, 1024:

'It is a necessary implication of the contract that the workman shall come to his work and shall leave with reasonable speed when the work is over.'

"The fact that the employee in leaving the premises was following the usual and customary route is ordinarily considered of weight in deciding that the accident has taken place in the course of the employment. *Bradbury on Workmen's Comp.* (3d. Ed.) 473-477; *Harper on Workmen's Comp.*, par. 36. Beyond question, an employee will generally be considered as being within the course of employment when he is going to or from his place of work while on the premises of the employer, if he is following the customary or permitted route in going to and from his work. It has been said that an employee must not choose a needlessly dangerous path to and from his work, but that it is not necessary for him to use the path or place provided by his master; that is, enough that it is customarily used for these purposes by the workmen, and that its use is not specifically forbidden. *Gane v. Norton Hill Colliery Co.*, 2 B. W. C. C. 42; *McKee v. Great Northern Railway Co.*, 1. B. W. C. C. 165; *Barnes v. Nunnery Coal Co.*, 4 B. W. C. C. 43; 25 *Harvard Law Review*, 411 and cases cited.

"As in this proceeding the accident happened before the employee reached the train of the defendant in error railway company, the question whether he was permitted to ride free has no controlling force on the question whether the accident arose out of and in the course of employment. In view of all the circumstances in the case, by the great weight of authority as well as by sound reasoning, we think the conclusion follows that this accident arose out of and in the course of Miller's employment.'³

§ 267. **Going to and from Work Using Conveyances of Third Parties.**—A messenger boy was injured while riding on a truck of a third party. He was furnished car fare when the distance was considerable. On the day of the accident he was sent a few blocks,

3. *Wabash Ry. Co. v. Indus. Comm.*, — Ill. —, 128 N. E. 290, 6 W. C. L. J. 649.

and being in a hurry to get back he caught a passing truck. In affirming a judgment of dismissal the court held that "plaintiff's employment was such that reasonable men could not conclude that, as an incident thereto, it might be expected that the hazard of accidental injury from obtaining rides on passing vehicles was connected therewith;" and that, "since plaintiff was provided with car fare when the messages were to go beyond a certain distance, he was to walk on all other occasions, and, therefore, when he sought other methods by which to accomplish his tasks he departed from the scope or ambit of his employment, and while so doing was not protected by the compensation act."⁴

An extra switchman, who reported for work and was informed that his services were not needed, climbed on a moving freight train for his own convenience in going home and was struck by a viaduct. It was held that the relation of master and servant did not exist at the time of the accident. Therefore the accident did not arise out of and in the course of the employment.⁵

Decedent was employed as a foreman. He had completed one job and was ordered to another at a different point in the state. Missing the regular stage he accepted the invitation of a friend to ride, as a guest, in an automobile. The automobile skidded and turned over, Deceased sustained injuries which resulted in his death within twenty four hours thereafter. The court, in holding, on appeal, that an award should be made, said: "In the case at bar it was an essential part of his employment that the deceased should travel from the place where he had installed one plant to the place where he was to install another. It is also clear that he adopted a reasonable and apparently the only facility for such travel under the circumstances, and as safe as any other that may have been available. No case is cited that adopts a different rule, and we know of none, as applied to workmen's compensation statutes."⁶

4. State ex rel. Miller v. District Court of Hennepin Co., 138 Minn. 334, 164 N. W. 1012, 15 N. C. C. A. 256, 1 W. C. L. J. 216.

5. Michigan Cent. R. Co. v. Indus. Com. et al., 290 Ill. 503, 125 N. E. 278, (Dec., 1919) 5 W. C. L. J. 189; Braley's Case, —Mass.—, (1921), 129 N. E. 420.

6. Industrial Commission of Colorado v. Aetna Life Ins. Co., 64 Col. 480, 174 Pac. 589, 17 N. C. C. A. 955, 2 W. C. L. J. 759.

An employee was engaged to go from place to place at the direction of his employer for the purpose of setting up machinery, which his employer sold. On these occasions it was discretionary with the employee as to what means of conveyance he would select to take him from one place to another. At the time of the accident he was going to his work in the automobile of his son. The automobile was upset and he was seriously injured. Compensation was awarded and the appellate court, in denying an appeal and holding that the accident did arise out of and in the course of the employment, said that the facts of this case took it out of the general rule contended for by the employer, since in this case the particular destination to which the employee was to go was not defined in advance, "but was the subject of direction from time to time by the employer to an extent which rendered the travel of the employee to such place a part of the employment itself sufficient to bring him within the category of a traveling employee."⁷

An injury to an employee while riding home in a conveyance owned by a fellow employee, when transportation was not furnished by the employer, does not arise out of the employment.⁸

An employee, engaged as cook in the river and harbor work, was drowned while crossing the river in a launch of a private party while on his way to work. It was held that the accident did not arise out of and in the course of the employment.⁹

A life insurance agent was riding in an automobile of a prospective customer when the automobile turned over and he sustained injuries. It was held that the accident did not arise out of the employment.¹⁰

An employee injured while riding home from work in the truck of another employee, over which the employer exercised no control, was not injured by an accident arising out of and in the course of the employment, since the employer had not undertaken to furnish transportation to his employees.¹¹

7. *London & L. Indem. Co. v. Indus. Acci. Com.*, 35, Cal. App. 681, 170 Pac. 1074, 16 N. C. C. A. 909, 1 W. C. L. J. 743.

8. *In re Gillis*, Ohio, I. C. 1915, 12 N. C. C. A. 388.

9. *In re Claim of Aaron Ware*, Op. Sol. Dep. C. & L. (1915), 334.

10. *Hewitt v. Casualty Co. of America*, 225 Mass. 1, 113 N. E. 672.

11. *Diaz v. Warren Bros. Co.*, — Conn. —, (1920), 111 Atl. 206, 6 W. C. L. J. 517.

§ 268. Going to and from Work While on Premises of Employer and While Passing Over Ways of Egress and Ingress.—

Where a carpenter fell when attempting to descend from the bin floor of an elevator, by way of a fire escape, which was used in going from his work to the timekeeper's office at the close of the day's work, it was held that the accident arose out of and in the course of the employment.¹²

Compensation was allowed for the death of a miner, who was crushed between the cage and the buntons of the shafts while leaving the mine after work hours, the court holding that the accident arose out of and in the course of the employment.¹³

Claimant had applied for work, and was informed that there was no work, but to call at the office before 7:30 the next morning and see if there would then be any. He was given, on request, lodging and a slip entitling him to supper and breakfast. He did not report at the appointed hour, but slept until 8:30; and at noon, while going from the sleeping car to the place where his pass entitled him to get breakfast, he was struck and injured while crossing the railroad tracks. Reversing an award in claimant's favor, the court held that claimant was not in defendant's employ at the time of the injury, and said further: "Even if claimant was an employee of the appellant, he was not acting in the course of his employment when injured. It is true that an employee is within the protection of the (New York) Workmen's Compensation Law (Consol Laws c. 67), not only when actually at work, but also while upon the premises of his employer he is going to or from work, or to or from a meal, or while at a meal which is had upon the premises during a temporary interruption of work. This claimant was not going to or from his work at the time of the injury, nor was he going to a meal during the interruption of his work, for he had as yet not worked at all. Finally, he was not going to a meal upon the premises, which he was permitted to take there, for his card to the boarding house

12. *Stephens Engineering Co. v. Indus. Com.*, 290 Ill. 88, 124 N. E. 869, 5 W. C. L. J. 205; *In Re Geo. J. Wheeler*, 2nd. A. R. U. S. C. C. 258.

13. *Moury v. Latham Coal & Mining Co.*, 212 Ill. App. 508, 18 N. C. C. A. 1034.

was for supper and breakfast only, and both these meals he had already eaten. He had no right to a noonday meal at the boarding house. Therefore, the claimant, even though an employee, was not in the course of his employment when injured."¹⁴

An employee of a lumber company was required to remain on the premises and to sleep in a bunk furnished by the employer. While lying in the bunk, talking to a fellow employee in the bunk above him, a straw fell and lodged in his throat. The court, in deciding that the injury arose out of and in the course of the employment, said that the general rule under the authorities is that when the contract of employment contemplates that the employee shall sleep upon the premises of the employer, the employee is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer. *Rucker v. Read*, 39 N. J. Law J. 48; *Chitty v. Nelson*, 2 B. W. C. C. 496; *Alderidge v. Merry*, 6 B. W. C. C. 450; *Griffith v. Cole Bros. et al.*, (Iowa), 165 N. W. 577; *Meyers v. Michigan Cent. R. Co.*, (Mich.), 165 N. W. 703; *Cokolon v. Ship Kenra*, 5 B. W. C. C. 658; *International & G. N. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. 219. In the present case the employee was under the protection and using the things which were furnished to him by the company. Under such circumstances the injury resulted from an accident arising out of and in the course of the employment.¹⁵

Where an employee was killed when he turned back, five minutes after quitting time, after washing and putting on his coat and hat, to look for his companions, and in so doing thrust his head into an elevator shaft and was struck by a descending elevator, the court held that the accident did not arise "out of and in the course of the employment, and said: "At the time he met his death he was not engaged in the business of his employment. He had ceased that. His act of turning back, looking about the room for

14. *Brassard v. Delaware & H. Co.*, 186 App. Div. 647, 175 N. Y. Supp. 359 (1919), 18 N. C. C. A. 1038; *Susznik v. Alger Logging Co.*, 176 Ore. 189, 147 Pac. 922.

15. *Holt Lbr. Co. et al., v. Indus. Comm. of Wis. et al.*, 168 Wis. 381, 170 N. W. 366; 3 W. C. L. J. 549.

his companions, and putting his head into the elevator shaft, was his own voluntary act. He had deviated from the direct and ordinary route of passage for purposes of his own."¹⁶

An employee fell from a trestle and was killed, while en route to his home for lunch. The employee chose the railroad in preference to a highway, in order that he might not be seen in his working clothes on Sunday. Permission was given him, by his employer, to use the railroad, and he was paid for the hour consumed in going for lunch. In holding that the present case did not come under the rule of protection against accidents occurring upon the premises of the employer, the court said: "At the time the deceased fell he was still 'within the limits of the railroad yards in which yard he performed certain of his duties,' there being nothing to indicate how far he had proceeded from where he stopped work. The fact that an employee is on the 'premises' of his employer when those premises consist of a railroad right of way or yards does not have the significance which it naturally would have in the case of an ordinary manufacturing plant. We know that such rights of way extend indefinitely, and that such yards are of no standard size, but run from small areas to tracts extending over many miles. Therefore, to say that the deceased was still within the yards where he performed some of his duties in no manner indicates that he was still within that reasonable distance of the point of cessation of his actual work where he would be protected. Nor do we think that this distance and protection would be indefinitely and as a matter of course extended simply because the employer permitted him for his own purposes to travel on the railroad right of way instead of taking the usual and safe course by the highway."¹⁷

Where an employee was injured by falling into the elevator shaft while attempting to use the elevator in going to his place of employment on the fourth floor, the court, in holding that the accident arose "out of and in the course of the employment,

16. *Urban v. Topping Bros. et al.*, 184 App. Div. 633, 172 N. Y. Supp. 432, 3 W. C. L. J. 184.

17. *McInerney v. Buffalo & S. R. Corp.*, 225 N. Y. 130, 121 N. E. 806, 3 W. C. L. J. 494.

said: "Under the rule first stated, if the employer were the owner of the building and the employee were injured on the elevator or stairs in reaching his place of work on a certain floor, it cannot be doubted that compensation is payable under the statute. The employee has reached the employer's premises and is using a means of access specially provided for that very purpose. It would seem to follow that if the employer did not own the building, but rented it all, compensation would still be payable, even though the employer did not operate or control the elevator, or have the control or care of the stairs, but such operation, control, and care remained with the owner of the building. The operation, control and care of the elevator and stairs in such a case would seem to be a matter wholly between the employer and owner of the building. It would not enter as between employer and employee and would be entirely extraneous to the employment. As to the employee it would be a matter of indifference whether the elevator or stairs necessary for access to the spot where he is to work are by the employer's lease operated and controlled by the latter or by the owner of the building, provided only that they are in fact furnished so that access by the employee may be had. There would seem to be no reason for allowing compensation where the employer controls the elevator for instance, and refusing it where he does not, when the fact as to who controls it is extraneous to the employment and the theory upon which compensation is now allowed under the Workmen's Compensation Act is not, as before, that the employer, either directly or through some agency or instrumentality under his control, has been guilty of some breach of duty toward the employee. So far as the employee is concerned, the elevator or stairs are a special means of access furnished him to get to his place of work, and, in effect, furnished him by his employer. By the lease the tenant has the right as an appurtenance of the premises leased to the use of the elevator or stairs for the purpose of access, and, so far as the tenant's employees are concerned, the elevator and the stairs are, in effect, a part of the employer's premises."¹⁸

18. *Starr Piano Co. v. Indus. Comm.*, (1919), —Cal.—, 184 Pac. 860, 5 W. C. L. J. 14; *In Re Sundrine*, 105 N. E. 433, 218 Mass. 1, 5 N. C. C. A.

Where an employee was crushed between cars while leaving premises, and using a route not intended for employees but not strictly prohibited, it was held that since there was no enforced rule against using this route that it could not be said that the accident did not arise out of and in the course of the employment.¹⁹ Neither could that be said where employees of different companies used the bridge of other companies indiscriminately in crossing canals.²⁰

An employee stopped at a commissary to talk to other employees and then continued homeward, and was struck by a stone thrown by a blast, which according to custom, was fired about ten minutes after quitting time. The court, in holding that the accident arose out of the employment, said, that the keeping of the commissary by the employer was for the mutual benefit of the employer and employees, and that the employees were expected to stop and avail themselves of its use.²¹

Where a laundress was allowed to do her own washing on the premises of her employer in addition to board, lodging and money as compensation for her labor for her employer, and she was injured while doing her own washing, it was held that the accident did not arise out of and in the course of employment, and that it was immaterial that the accident occurred while she was doing what she was permitted to do by her contract of employment, for she was not engaged in performing any task of her employer.²²

616, L. R. A. 1916A, 318; *White v. Slattery Co.*, —Mass.—, (1920), 127 N. E. 597, 6 W. C. L. J. 323; *Papineau v. Indus. Acc. Comm.*, — Cal. App. —, (1920), 187 Pac. 108, 5 W. C. L. J. 492; *Latter's case*, — Mass. —, 130 N. E. 637, (1921).

19. *Baltimore Car Foundry Co. v. Ruzicka*, 132 Md. 491, 104 Atl. 167, 17 N. C. C. A. 945, 2 W. C. L. J. 791; *In re Claim of Chambers*, Op. Sol. Dep. C. & L. (1915), 291.

20. *Procacins v. E. Horton & Sons*, — Conn. —, 111 Atl. 594, 7 W. C. L. J. 31.

21. *Merlino v. Conn. Quarries Co.*, 93 Conn. 57, 104 Atl. 396, 17 N. C. C. A. 945, 2 W. C. L. J. 781; *In re Stephen J. Lloyd*, 2nd A. R. U. S. C. C. 260; *In re Max Stange*, 2nd A. R. U. S. C. C. 261.

22. *Daley v. Bates and Roberts*, 224 N. Y. 126, 120 N. E. 118, 17 N. C. C. A. 946.

“When Trotzke entered the inclosure of the Inland Steel Company undoubtedly he was in a place where his employer’s business required him to be, and so long as he remained in that place he was exposed to certain inherent dangers to which he would not have been exposed apart from the business of his employer. By one of the inherent hazards of that place he was fatally injured, and the Industrial Board was justified in finding that the injury which resulted in his death arose out of the employment.”²³

Deceased had been in the employ of a hotel company, in charge of the passenger and freight elevators and their operators. On the day of the accident she had performed the duties of starter and had worn the uniform of a starter. She had “punched out” on the time clock at 7:30 p. m., and a few minutes after 8 p. m., she entered one of the elevators and rode up and down for 15 minutes. At this time she was in street attire. She was talking with the operator, but the topic of conversation does not appear. While they were thus occupied, a passenger got off at the tenth floor, and deceased followed. The operator closed the door, and as the elevator started up deceased pushed open the door and attempted to enter. She tripped, and as the elevator was moving, fell into the shaft. Compensation was awarded for her death, the court, in affirming the award, saying: “Relators make much of the fact that deceased had ‘punched out’ on the time clock and that she was dressed for the street; hence, it is said, the finding is not sustained that she met death in the course of her employment from an accident arising out of it. This overlooks some persuasive testimony given by the assistant manager of the employer, to the effect that deceased had no stated hours of work, but was practically on duty all the time, as he put it, ‘24 hours in the day;’ that she used her own discretion as to the time within which she was to do that which was expected of her, that the wearing of the uniform was not obligatory for her, and that she was not required to punch the time clock, for her wages were not paid upon its record. The inference is near at hand that she was at the moment of the ac-

23. *Great Lakes Dredge & Dock Co., v. Trotzke*, —Ind. App.—, 121 N. E. 675, 18 N. C. C. A. 1032.

cident engaged in her work, endeavoring to ascertain whether the doors of the elevator she was riding on locked properly. It seems their defective condition in this respect was the direct cause of her death."²⁴

An employee was injured when he was leaving the premises, upon being informed that his services were not required. It appeared that upon the particular morning of the accident the employee was late but it was claimed that he was refused work because he was not in a sober condition. The employer sought to escape liability on the grounds that the employee was not a regular employee, but was there asking for work, and therefore he was not injured in the course of his employment. It was found that he had been employed for 8 months previous to the day of the accident, and that there was not a separate employment from day to day. He was therefore a regular employee and was there in the performance of his duty as such, and was entitled to benefit of the act.²⁵

An employee on a boat reported for duty at 5 p. m. and was informed that the boat would not sail until 11 p. m. He then went ashore, and when returning at 10 p. m. he sustained injuries while passing through his employer's yard. The court held that if the employee left the boat without permission, then the accident did not arise out of the employment. The court said: "If Carter left the boat by permission, and while returning to it and his work he was injured upon his master's premises, and while he was proceeding over a not unreasonable route, and while he was at a place where he had a right to be, and within the period of his employment, which began at 5 o'clock, he was injured in the course of his employment, and his employment was the proximate cause of his injury."²⁶

A trackman was engaged to work for a railroad company. His employment was to begin a few days later. He was given a pass over the company's line to a bunk car furnished by the company.

24. *State ex rel. Radisson Hotel v. District Court Hennepin County, (Minn.)*, 172 N. W. 897.

25. *Kiernan v. Priestedt Underpinning Co.*, 171 App. Div. 539, 157 N. Y. Supp. 900, 13 N. C. C. A. 497.

26. *Carter v. Rowe*, 92 Conn. 82, 101 Atl. 491, 15 N. C. C. A. 258.

He was struck by one of the company's cars and killed while waiting to get into the bunk car after he had arrived on the grounds where the car was located. It was held that the accident did not arise out of and in the course of the employment, the court saying, that he was not at the time of the accident engaged in performing any act in the line of his employment, since his labors under the agreement were not to begin until some time later.²⁷

Where a hotel chef had been dismissed from employment but failed to leave, and about an hour after he was dismissed he cut his hand while preparing meals, it was held that the relationship of employer and employee had been terminated prior to the accident, therefore the accident did not arise out of and in the course of the employment.²⁸

Where a laborer was injured while passing into a building under construction, to apply for work, in response to information that men were needed, it was held that he was not an employee.²⁹

An employee, on his way to the time keeper's office to check out in the evening, had to wade through impure flood water which overflowed defendant's car yards. An old sore became infected and necessitated amputation. The evidence tended to show that there was no other means of getting from the place where claimant was employed. Affirming judgment in favor of the employee the court said: "Irrespective of any question of negligence, the standing of the flood water on the ground which was a part of the defendant's factory became for the time being one of the conditions under which the business was carried on. It was not a condition peculiar to the kind of business done, but it was one which gave rise to a special risk incurred by the workmen there engaged. We think the injury (assuming the facts to be as claimed by the plaintiff) is to be regarded as one arising out of the employment."³⁰

27. *Bloomington, Decatur & Champaign R. Co. v. Industrial Bd. et al.*, 276 Ill. 239, 114 N. E. 517, 13 N. C. C. A. 490.

28. *Greenberg v. Atwood*, 38 N. J. L. J. 54, 13 N. C. C. A. 495.

29. *Dickerson v. Bornstein*, 137 S. W. 773, 144 Ky. 19.

30. *Monson v. Battelle*, 102 Kan. 208, 170 Pac. 801, 16 N. C. C. A. 896, 1 W. C. L. J. 770.

An employee fell downstairs when on his way out after working hours on his way home, intending to make a delivery of cigars for his employer according to his usual custom. Holding that the accident arose out of and in the course of deceased's employment, the court said: "It is plain, therefore, that Grieb's service, if it had been rendered during working hours would have been incidental to his employment. To overturn this award, it is necessary to hold that the service ceased to be incidental because rendered after hours. The law does not insist that an employee shall work with his eyes upon the clock. Services rendered in a spirit of helpful loyalty, after closing time had come, have the same protection as the services of the drone or laggard. * * * All the circumstances point to the conclusion that Grieb left the factory on the fatal errand for the sole purpose of helping the master in the transaction of the master's business. It was not mere friendship, it was the relation of employer and employee, that led the one to request the service and the other to render it. If such service is not incidental to the employment within the meaning of this statute, loyalty and helpfulness have earned a poor reward."³¹

A miner slipped and fell on a track in leaving the premises on a frosty morning, and sustained injuries. The lower court held that the risk of falling was common to all persons on a frosty morning and therefore the accident did not arise out of the employment. Applying the rule laid down by the House of Lords in *Simpson v. Sinclair*, (1917) A. C. 127, (1917) W. C. & Ins. Rep. 164, 15 N. C. C. A. 224n, rev'g (1915) W. C. & Ins. Rep. 543, (1915) 2 Sc. L. T. 291, *Swinfen Eady*, L. J., said: "Here it was by reason of the workman's employment that he was compelled to be in this particular place. It was the ordinary way of leaving the colliery premises to go to his home. There is no suggestion that it was a way that he ought not to have taken, or a prohibited way. It was the ordinary way home, and slipping and falling with his arm on this rail at this spot was, in my opinion, an accident that arose out of as well as in the course of his employ-

31. *Grieb v. Hammerle*, 222 N. Y. 382, 118 N. E. 805, 16 N. C. C. A. 897, 1 W. C. L. J. 846; *In re Caim of Fahey*, Op. Sol. (1915), 218.

ment. For these reasons I am of opinion that the appeal should be allowed, and an award made in favor of the workman.³²

The usual means of heating water, for washing before leaving the premises after work hours, was out of order, and the employees sought to heat a bucket of water by placing it in a tank, which they took to be filled with hot water, but which in fact was an explosive acid that exploded when it came in contact with the cold bucket and severely burned the employee. The tank bore no danger label. The fact that the injured employee departed from the usual and customary way of providing hot water for washing, when deprived of the usual means of heating water for such purpose, cannot deprive him of the benefits provided by the Indiana workmen's compensation law. He was still pursuing his original purpose and the deviation in the plan of accomplishing the end in view, under the circumstances, was not unreasonable or unnatural.³³

The test in determining whether the injury has arisen in the course of employment is then said to be where the deceased, "though actually through with the work, was still within the sphere of the work, or was doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time."³⁴

Where a threshing hand was injured while assisting in placing the machine on the highway after a job had been finished and the employee paid off, it was held that the accident arose out of and in the course of the employment, because of a custom of the

32. *Wales v. Lambton & H. Colleries*, (1917), W. & C. Ins. Rep. 289, 16 N. C. C. A. 898; *Marsh v. Pope & Pearson, Ltd.*, (1917), W. C. & Ins. Rep. 267, 16 N. C. C. A. 899; *in re Herbert Ferguson*, 2nd A. R. U. S. C. C. 262.

33. *In re Ayers*, 64 Ind. App. —, 118 N. E. 386, 16 N. C. C. A. 900, 1 W. C. L. J. 559.

34. *In re Stacy*, 225 Mass. 174 114 N. E. 206; *Demann v. Hydraulic Engineering Co.*, 192 Mich. 594, 159 N. W. 380; *Indian Creek Coal Mining Co. v. Wehr*, — Ind. —, (1920), 128 N. E. 765, 7 W. C. L. J. 47; *In Re Louis Mahin*, 3rd. A. R. U. S. C. C. 174.

country wherein threshing employees were expected to assist in placing the machine out on the highway.³⁵

An employee was compelled to cross a trestle over planks which were unguarded in order that he might reach the car from which he was to unload coal. The planks leading to the car were frosty and slippery. Deceased was found on the ground below the ladder, where he naturally would have been had he fallen from the trestle. In overruling the contention of the employer that the accident did not arise out of and in the course of the employment, the court said: "The board were well warranted in finding that the employee met with his injury in the course of his employment. It occurred at the time and place of his occupation, and while he was engaged in the duties incidental to it. The evidence also warranted their conclusion that the injury arose out of his employment. If his fall was due to the slippery, unguarded and dangerous condition of the trestle and ladder, then his injury was caused by a risk incident to the work he was employed to do."³⁶

An employee was blind in one eye, but his vision was ample for the work he did. About 6 p. m., when he was on his way leaving the premises by a stairway, he slipped or became overbalanced and fell. In holding that the accident arose out of his employment the court said: "We are of opinion that there is a reasonable probability that some employee in the course of his employment will fall and receive an injury while descending a stairway of an employer, constructed and used as the stairway was in the case at bar. It follows that the likelihood of such a fall is a risk and hazard of that business."³⁷

Where a miner was injured by a projecting piece of slate, while leaving the mine at the close of his day's work, it was held

35. *Newson v. Burstal*, (1915), W. C. & Ins. Rep. 16, 15 N. C. C. A. 218.

36. *In re Uzzio*, 228 Mass. 331, 117 N. E. 349, 15 N. C. C. A. 234, 1 W. C. L. J. 80.

37. *In re O'Brien*, 228 Mass. 380, 117 N. E. 619, 15 N. C. C. A. 236, 1 W. C. L. J. 213.

that the accident arose out of and in the course of the employment.³⁸

Where an employee was injured when he attempted to board a switch engine to go to punch a time clock at the entrance of the employer's plant, about five blocks from where the employee quit work, it was held that the accident happened in the course of the employment but did not arise out of it, the court saying: "It cannot be said that the attempt to mount the locomotive was in the interest of the employer, or for the purpose of expediting the employer's work, since the employer was not interested in the speedy checking out of the appellee, but interested only in the checking out being accomplished. In our judgment the facts do not present a situation wherein the employee negligently performed a duty, or was guilty of negligence in the performance of a duty, but rather a case wherein he attempted unnecessarily to do a perilous act, not reasonably incident to his employment."³⁹

Where a workman quit his work at the end of the day and rode towards the other end of the mine on an engine with other employees for the purpose of ascending and was injured, when the engine collided with cars which had been insecurely placed on the switch line, it was held that the injury arose out of and in the course of the employment. The court said: "While he had ceased work at the coal loader, he was still in the pit, the place of employment, and still under the direction and control of the defendant. It cannot be said he was outside of his employment, when he was passing from one part of the pit to the other, riding on the engine, a common means of transportation in going to the tippie, an appliance of the defendant for the purpose of ascending above ground. It was the usual custom of the miners "to ride out upon the last trip" upon the dinkey engines, and this was done with the acquiescence of the defendant. The injury which occurred on the trip was a result which was or should

38. *Sedlock v. Carr, Coal & Mfg. Co.*, 98 Kan. 630, L. R. A. 1917 B. 372, 159 Pac. 9, 15 N. C. C. A. 237.

39. *Inland Steel Co. v. Lambert*, 64 Ind. App. —, 118 N. E. 162, 15 N. C. C. A. 240, 1 W. C. L. J. 347.

have been in contemplation of the defendant and which grew out of and was reasonably incident to plaintiff's employment.^{'40}

Where an employee attempted to cross between the cars of a train standing on the track, and the train moved, precipitating the employee to the ground and killing him, it was held that the accident did not arise out of the employment, the court saying: "To establish that the accident arose out of the employment it must be shown that it was part of his employment to hazard, suffer or do that which caused the injury. Therefore where a workman has permission to traverse his employer's property, but not by any prescribed route, or marked path, such permission does not entitle him to climb over or scramble under any obstacle which he may find on a route chosen arbitrarily by him."^{'41}

Where an employee, while attempting to leave a ship, fell from a plank used in reaching the quay and sustained injuries resulting in his death, it was held that the accident arose out of and in the course of the employment.⁴²

Where a warehouse employee was killed by an electric current when he went into the washroom to clean up after his day's work, it was held that the accident arose out of and in the course of his employment.⁴³

Where a boy was suspended from work and ordered to go to the pit bottom, a place where the miners waited for the ascension of the cage, but refused to do so and was injured, it was held that his injury did not arise out of nor in the course of the employment.⁴⁴

40. *Chance v. Reliance Coal & Mining Co.*, — Kan. —, (1920), 193 Pac. 889, 7 W. C. L. J. 201.

41. *Lancashire & Yorkshire Ry. v. Highley*, (1917), W. C. & Ins. Rep. 179, 15 N. C. C. A. 210.

42. *Duck v. North Sea Steam Trawling Co. Ltd.*, (1915), W. C. & Ins. Rep. 529, 15 N. C. C. A. 257.

43. *Hollenbach Co. v. Hollenbach*, 181 Ky., 262, 204 S. W. 152, 2 W. C. L. J. 492.

44. *Smith v. South Normanton Colliery Co.*, (1903), 1 K. B. 204, 5 W. C. C. 14, 7 N. C. C. A. 422; *Schlenker v. Panama Col. Expos. Co.*, 1 Cal. I. A. C. D. (1914), 9, 7 N. C. C. A. 423.

Where an employee was injured after the whistle blew and while he was running to get his coat and hat, it was held to be an accident arising out of and in the course of employment.⁴⁵

A railroad employee was given permission to go home for his dinner, which was contrary to custom. He chose to follow the railroad track in preference to taking a highway, which led in the same direction and to his home. He was struck by a train, of which he had been warned and was killed. It was held that the evidence was not sufficient to establish that the accident arose out of or in the course of the employment. The fact that he was still on the premises of the employer was immaterial, since he was on a mission of his own and traveling over a route entirely of his own choosing.⁴⁶

Where an employee, who was ordered to bring his boots for use in the employment, was struck by a train and killed while crossing the tracks to sit upon a hand-car to put on his boots, it was held that at the time of the accident deceased was in the performance of an act incidental to his employment.⁴⁷

Where an employee is injured while ringing out at a time clock, at the close of his day's work the accident arises out of and in the course of the employment.⁴⁸

Where an employee was injured while running with others at the close of the noon hour, to punch the time clock, after having been engaged in playing ball, it was held that the accident did not arise out of and in the course of the employment.⁴⁹

A workman fell and was injured while going through the main gate of a navy yard. It was held that the accident arose out of and in the course of the employment.⁵⁰

45. In *Re Shroeb*, Ohio I. C., (1914), 7 N. C. C. A. 420; *Gardiner v. State of Cal. Printing Office*, 1 Cal. I. A. C. D. (1914), 4, 4 N. C. C. A. 859.

46. *Hills v. Blair et al.*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409.

47. *Brown v. City of Decatur*, 186, Ill. App. 147, 7 N. C. C. A. 418.

48. In *re Claim of Rugan*, Op. Sol. Dep. C. & L. 220, (1915).

49. In *re Claim of David Kramer*, Op. Sol. Dep. C. & L. (1915), 322.

50. In *re Claim of Guerin*, Op. Sol. Dep. C. & L. (1915), 324; In *re Claim of Bernard* Op. Sol. Dep. C. & L. (1915), 323; In *re Claim of McSorley*, Op. Sol. Dep. C. & L. (1915), 331.

It may be stated as a general rule that an accident arises out of the employment if the employee has reached his employer's premises on his way to work, or is still on the employer's premises on his way home. The exception to this rule arising from certain extraordinary facts and circumstances are noted throughout this chapter.⁵¹

Where an employer's premises includes practically the whole town with no well defined routes for pedestrian travel, an employee killed by a train while returning from lunch was at the time in the course of the employment, even though the train was owned by others than the employer. The court said: "By the direct language of the Texas act there need be no direct causal connection between the actual employment and the injury, the statute in this particular being satisfied if it be merely shown that the injury occurred in the course of the employment in the sense that it had to do with and originated in the business of the employer, the only other requirement being that the employee be at the time engaged in or about the furtherance of his employer's affairs.

"As we understand the current decisions touching the spirit of such laws as this, the employee does not have to be actually performing some specific duty of his employment at the precise time of the injury before it can be said to have been received 'in the course of employment,' but it is quite generally held that, if

51. *Nicol v. Youngs Paraffin Light & Mineral Oil Co.*, (1915), (Scotch Court of Session), 8 B. W. C. C. 395, 12 N. C. C. A. 654; *Gane v. Norton Hill Colliery Co.*, (1909), 2 B. W. C. C. 42; *Hoskins v. Lancaster*, (1910), 3 B. W. C. C. 476; *Fitzpatrick v. Hindley Field Colliery Co.*, (1901), 3 W. C. C. 37; 4 W. C. C. 7; *Re Ramon Z. Gonzales*, Op. Sol. Dep. L. p 333; *Re Wm. P. Fahey*, Id. 218; *Re O. D. Koontz*, Id. 229, *Re Joseph Chambers*, Id. 226, 228, *Re Emanuel L. Bernard*, Id. 323, *Re M. Guerin*, Id. 324; *Sedlock v. Carr Coal Mining Co.*, (1916), 98 Kan. 680, 159 Pac. 9, *In re Stacy*, (1916), 225 Mass. 174; 114 N. E. 206; *De Mann v. Hydraulic Engineering Co.*, (1916), 192 Mich. 594, 159 N. W. 380; *Matter of Kierman v. Friestadt Underpinning Co.*, 171 App. Div. 539, 157 N. Y. Supp. 900; *Leslie v. O'Connor & Richman*, 5 N. Y. St. Dep. Rep. 383, 11 N. C. C. A. 501; *Foley v. Bretton Hall Co.*, 4 N. Y. St. Dep. Rep. 339, *Smith v. Gold*, (1916)), 9 N. Y. St. Dep. Rep. 376, *Nicholson v. Klipstein & Co.*, 4 N. Y. St. Dep. Rep. 412. But see *Schweiss v. Indus. Comm.*, — Ill. —, (1920), 126 N. E. 566.

he is doing something incidental to his service while on the premises of the master, the injury under such circumstances meets the requirements and is compensable. *Carter v. Rowe*, 92 Conn, 82, 101 Atl. 491; *Milwaukee Fuel Co. v. Commission*, 159 Wis. 635, 150 N. W. 998, par. 3, *Rainford v. Ry. Co.*, 289 Ill., 427, 124 N. E. 643.⁵²

§ 269. **Going to and from Work Where Employment is not Limited to Fixed Hours.**—An employee whose hours of work were not limited to any definite time was called upon to convey other employees to an outside job, and while returning his auto skidded and turned over and he was killed. The court, in holding that the accident arose "out of and in the course of the employment," said: "When a member of the firm directed Horace Rogers to take Mr. Walke to the Dolan camp, it was his duty to obey. There was no obligation resting on him to inquire whether the performance of that duty would inure to the benefit of the firm. That question was no concern of his. It would be an unjust and unreasonable rule that would have required him to decide that question at his peril. The presumption is that the master knows his own business, and it is the exclusive province of the master to determine questions of that character for himself."⁵³

Decedent was in the employ of the relator, whose principal place of business was at Minneapolis, Minnesota. He received a salary and traveling expenses, excepting board while at home. His duties were to solicit shipments of grain to the relator. While on his way home from the field of labor on Sunday morning, he came to his death by accident, while attempting to cross the Missouri river in a row boat. In holding that the dependents were entitled to compensation, the court said: "Decedent's duties required his traveling from place to place in his territory, which was several hundred miles from his employers' place of business. It was proper that he have some regular or fixed place for communicating with his employers. His home was near his field of

52. *Lumberman's Reciprocal Ass'n v. Behnken*. —Tex. Civ. App.—, (1920), 226 S. W. 154, 7 W. C. L. J. 363.

53. *Rogers v. Rogers*, —Ind. App.—, 122 N. E. 778, (1919), 18 N. C. C. A. 1033, 4 W. C. L. J. 58.

labor. He made it his headquarters, as well as his retreat for over Sunday, as he properly would, and as his employers must naturally have expected and intended he should do. Indeed, all of the correspondence between them so indicates. We see no reason why he might not properly, and without stepping outside the scope of his employment, return to his home from his field of labor on the Sabbath day.⁵⁴

The duties of a flour salesman required him to be on the public streets, and his hours of labor were largely within his own discretion. While crossing a street, on his way to board a car to return to his home, from where it was customary for him to telephone orders for goods to his employer, he was struck and injured. It was held that the accident arose out of and in the course of the employment.⁵⁵

Deceased was an engineer employed by the defendant with no fixed hours of service. He was sent out to a point in another state to examine natural gas burners. Upon returning he was struck and killed while going to his home to sleep. It was held that the accident occurred in the course of the employment and arose out of it. The court holding, that the mere fact that he was going home before reporting to his employer was immaterial, in view of the fact that he arrived in town too late to go to his employer that day to report.⁵⁶

Compensation was awarded for the death of an elevator operator which occurred after she had quit her regular shift, punched the clock and changed to street clothes, and was riding up and down on the elevator conversing with the operator who relieved her. She stepped off on the tenth floor, and when the elevator operator closed the door and started the elevator upwards, decedent pushed upon the door and attempted to enter, tripped, and fell back into

54. *St. ex rel. McCarthy Bros. Co. v. District Court of Hennepin County et al.*, 140 Minn. 61, 169 N. W. 274, 3 W. C. L. J. 161; *State ex rel London & Lancashire Indemnity Co. of America v. District Court of Hennepin County*, 141 Minn. 348, 170 N. W. 218, (1919), 17 N. C. C. A. 958.

55. *Bachman v. Waterman* — Ind. App. —, 121 N. E. 8, 3 W. C. L. J. 115.

56. *Haddock v. Edgewater Steel Co.*, 263 Pa. 120, 106 Atl. 193 (1919), 3 W. C. L. J. 786.

the shaft. In affirming an award for compensation the court said: "Relators make much of the fact that deceased had 'punched out' on the time clock and that she was dressed for the street; hence, it is said, the finding is not sustained that she met death in the course of her employment from an accident arising out of it. This overlooks some persuasive testimony given by the assistant manager of the employer, to the effect that deceased had no stated hours of work, but was practically on duty all the time, as he put it, '24 hours in the day;' that she used her own discretion as to the time within which she was to do that which was expected of her, that the wearing of the uniform was not obligatory for her, and that she was not required to punch the time clock, for her wages were not paid upon its record. The inference is near at hand that she was at the moment of the accident engaged in her work, endeavoring to ascertain whether the doors of the elevator she was riding on locked properly. It seems their defective condition in this respect was the direct cause of her death."⁵⁷

A traveling salesman slipped on an icy sidewalk and sustained a compound fracture of the upper part of the femur. In holding that the accident arose out of the employment, the court said: "The localities to which he was sent in the discharge of the duties of his employment constituted the place or places in which he was required to work. By reason of his employment he was at the place where he was injured. He was where his employment took him, and the hazard of the icy street was incidental to such employment. This proposition is not changed by the fact that the public generally in that vicinity was exposed to the hazards of the icy street."⁵⁸

An insurance agent was injured while riding with a prospective customer, who invited him to make a trip in an automobile. Believing he could further his employer's business thereby he accompanied him. In reversing an award the court said: "The

57. *State ex rel. Radisson Hotel v. District Court of Hennepin County*; 143 Minn. 144, 172 N. W. 897, (1919), 18 N. C. C. A. 1033; *In re Edward C. Smith*, 3rd A. R. U. S. C. C. 175.

58. *In re Harraden*, 64 Ind. App. —, 118 N. E. 142, 1 W. C. L. J. 338, 15 N. C. C. A. 230.

field of Hewitt's (claimant's) employment, measured and limited, not by material space, but by his ability to find, interest and retain as customers, persons interested in providing for the whole or partial future independence of themselves or those dear to them, in a sense was boundless. The time for work and the manner and method to be followed in its successful pursuit, necessarily rested in the judgment of the agent, founded upon his experience and skill. In going to Providence, Rhode Island, the agent plainly did not leave the field within which he was authorized to work for his employer; nor in availing himself of the opportunity for legitimate persuasion granted to him by Pierce (the prospective customer), did he violate any express or implied condition of his employment? In the prosecution of the business of soliciting insurance Hewitt was independent. While authorized and expected to go where there was any reasonable prospect of securing a customer, his time and his method of procedure was his own. He might travel on foot, on horseback, by trolley, train or automobile. He might write, telephone or telegraph. He was wholly free as to time, place or weather. Under such circumstances, when one accepts an invitations to ride, an injury received is not 'occasioned by the nature of the employment.' The danger incident to the use of an automobile is not a 'causative danger peculiar to the work,' but is a risk which is common to all persons using one. The injury cannot be said reasonably to have been contemplated as the result of the exposure of the employment.'⁵⁹

Where an insurance agent fell down a stairway while going from door to door making collections, it was held that the injury arose out of and in the course of the employment.⁶⁰

Where a gas Company's employee's work was not limited to any fixed hours, and consisted of miscellaneous outside jobs, continuous in their nature, such as reading meters, shutting off gas when patrons ceased using it, collecting rents, etc., it was held that he was under the protection of the act at all times except when at home. Therefore disability caused by a collision

59. Hewitt's Case, 225 Mass. 1, 113 N. E. 572, L. R. A. 1917B, 249: Note; For further cases regarding salesmen, see Street Accidents.

60. Refuge Assurance Co. v. Millar, 49 Scot L. R. 67, 5 B. W. C. C. 522.

between his motorcycle and an automobile in the street, when he was on his way home and not actually engaged in the performance of a service of his employment at the specific time and place of the accident, was held to have arisen out of and in the course of his employment. Compensation was allowed.⁶¹

Where a policeman was killed by being struck by a railroad train, after working hours, while on his way home, it was held that in the absence of any evidence to show that the policeman was executing some orders emanating from his superiors, or performing some duty of his own initiative, which in either case, under the city ordinance, would bring him within the protection of the compensation act, it cannot be presumed that at the time he was killed he was still in the line of duty. Such presumption arises only when the accident occurs during the regular hours of duty.

To hold otherwise would be arriving at a conclusion based merely on guess or conjecture which will not be permitted. The accident not having arisen out of nor in the course of the employment, compensation was denied.⁶²

Applicant was employed as a police judge, and was allowed to devote that portion of his time not required in performing his duties as police judge, to private practice. In denying compensation, for an injury sustained as a result of being struck by an automobile, while on his way to his private office, it was held that the accident did not arise out of or in the course of his employment. Though, by the terms of his employment, an employee is required to be ready to perform certain duties at any hour of the day or night, it does not follow that every accidental injury which he may receive during the course of the twenty-four hours arises out of his employment. To have all the requisites for compensation present, it is necessary that the employee be, in fact, at the time of the injury, discharging some of the duties which he is employed to perform.⁶³

61. *Ferguson v. Royal Indemnity Co.*, 1 Cal. Ind. A. C. D. (1914), 8, 7 N. C. C. A. 414.

62. *In re Lyman*, Ohio Ind. Comm. (1914), 7 N. C. C. A. 412.

63. *Gallup v. City of Pomona*, 1 Cal. I. A. C. D. (1914) 6, 7 N. C. C. A. 411.

It was held in a California case that compensation would not be awarded an employee who, purely for his own purpose, leaves his place of employment before his day's work is finished and, several hours later, is injured upon the public streets when returning to his place of work for the purpose of attending to some unfinished duties. The employee was expected to respond to emergency calls by telephone out of regular hours, though it does not appear that he was responding to such calls. The court quoted with approval the following from an earlier case: "The right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the service he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore an employee going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at his place of employment he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his task."⁶⁴

Where a factory employee, who was obliged to look after fires and lights on Sunday and to see that everything was in working order for Monday, was injured while cranking his own car to go from the factory to a garage to get spark plugs for a truck which he would drive for his employer on Monday, it was held that the injury arose out of and in the course of the employment.⁶⁵

§ 270. Seamen and Others Employed on Vessels Injured When Getting On and Off Vessels.—A captain of a tugboat was discharged because of intoxication and afterwards his body was found in the vicinity of the pier. The court, in denying compensation, said that if it be considered that, after discharge of deceased, his employment continued a reasonable length of time to enable him to remove his belongings from the boat, it must nevertheless have ceased immediately upon his leaving it. To infer that he fell into the water while in the act of leaving the boat, or prior thereto, rather than after leaving it he fell from the dock.

64. *Fidelity & Casualty Co. of N. Y. et al. v. Indus. A. C. of Cal.*, — Cal.—, 192 Pac. 166, 6 W. C. L. J. 640.

65. *Martin v. Henry Card & Co.*, 183 N. Y. S. 88, 6 W. C. L. J. 484.

while proceeding along its edge in an intoxicated condition, would be basing an award on mere conjecture. Therefore, there was no proof that the deceased came to his death through an accident arising in the course of his employment.⁶⁶

A seaman was drowned when returning to the ship, after purchasing provisions for his own use. It was held that at the time the seaman met his death he was not engaged in the ship business nor in any duty owed to his employer, therefore the accident did not arise out of and in the course of his employment.⁶⁷

Where a cook on board a tugboat was drowned when he fell overboard from a wharf, to which his boat was moored, he having gone on shore to purchase supplies, a part of his duty, and returning with some of them in his possession, it was held that he was injured in the course of his employment, because at the time of his death he was doing, at a time, at a place and of a nature, the duties which his employment reasonably called him to perform. His accident was a natural incident to his work, the risk was one occasioned by the nature of his employment, the injury was traceable to the nature of his work and to the risks to which his employer's work exposed him.⁶⁸

An employee on a boat reported for duty at 5 o'clock and was informed that the boat would not leave until 11 p. m., and was given permission to go ashore. When returning to the boat, and while going through their yard to board the boat, he fell and sustained injuries. The court said: "If Carter left the boat by permission, and while returning to it and his work he was injured upon his master's premises, and while he was proceeding over a not unreasonable route, and while he was at a place where he had a right to be, and within the period of his employment, which

66. *In re Whalen*, 186 App. Div. 190, 173 N. Y. Supp. 856 (1919); 18 N. C. C. A. 1037; *Spencer v. Liberty (Owners of)*, (1917), W. C. & Ins. Rep. 293, 16 N. C. C. A. 913.

67. *Parker v. Black Rock (Owners of)*, (1915), W. C. & Ins. Rep. 369, 15 N. C. C. A. 259; *In re Theodore E. Perin*, 3rd A. R. U. S. C. C. 176.

68. *Westman's Case*, 118 Me. 133, (1919), 106 Atl. 532, 4 W. C. L. J. 213.

began at 5 o'clock, he was injured in the course of his employment and his employment was the proximate cause of his injury."⁶⁹

A dredge employee was drowned when returning from a trip ashore on his own business. In holding that the accident did not arise out of and in the course of the employment, the court said: "The controlling fact is that he had been ashore solely for purposes of his own, and lost his life before he returned to his place of employment or to the premises of his employer, and before he had gained access to the boat, which was to carry him from the dock to the dredge."⁷⁰

A seaman was drowned while returning from attending a wedding on shore. It was found that the boat used in reaching the shore was supplied by a fellow seaman, and was not provided by or with the knowledge of his employers, and that the accident happened while the workman was outside, and before he had returned to, the ambit of his employment.⁷¹

A seaman was drowned while leaving his boat to go ashore to collect the purchase money of rope sold by the defendants. The court held that the accident arose out of and in the course of the employment since the deceased was going ashore to perform a duty owed to his employer.⁷²

A chief engineer aboard a vessel went ashore on business of his own and with permission. When returning he made his way along the quay towards a bridge which he had to cross to reach his vessel. He missed the bridge and fell from the pier into the water and was drowned. In holding that the accident did not arise out of and in the course of his employment, the court said: "If the employee had reached the ship or ladders by which the ship was to be boarded he might properly be taken to have been directed to use them as being part of the vessel on which he was living as an

69. *Carter v. Rowe*, 92 Conn. 82, 101 Atl. 491, 15 N. C. C. A. 258.

70. *Berg v. Great Lakes Dredge & Dock Co.*, 173 N. Y. App. Div. 82, 158, N. Y. Supp. 718, 12 N. C. C. A. 74.

71. *McLean v. David McBrayne*, (1915), W. C. Ins. Rep.

72. *Duck v. North Sea Steam Traveling Co., Ltd.*, (1915), W. C. & Ins. Rep. 529, 15 N. C. C. A. 257; *Harman v. Crow*, 1915 W. C. & Ins. Rep. 526, 15 N. C. C. A. 258.

incident to his employment. But was the quay by which he was actually approaching when the accident happened a place where he was directed to be, or a place for which the employers had any responsibility at all. It seems to me that this question ought on broad principles to be answered in the negative. Surely a street in Ramsgate would not have been such a place in the absence of special circumstances. That is clear from principles which have been firmly laid down. In order to make it such a place it would be necessary to prove as a special fact that the engineer was directed to use it for some object in which he was employed. Here there was no direction. He was allowed leave for his own purposes.

"Was the quay, then, different in this respect from a street? It is said that it was, inasmuch as it was the natural way of proceeding towards the place where the ship was berthed. But a street might also have been part of such natural way."⁷³

A seaman was drowned while returning from making purchases of provisions for himself, when he fell from the ladder which was the only means of access to the ship from the dock. It was held that the accident arose out of and in the course of employment.⁷⁴

An employee, who was furnished living quarters on a boat by the Government, was drowned while going in a small boat to get fellow employees who had been ashore all night. It was held that the injury causing death occurred in the course of the employment.⁷⁵

An engineer on a tugboat, by mistake in the location of his own boat, went to another boat, and while attempting to reach his own boat was drowned. It was held that the accident did not arise out of and in the course of the employment.⁷⁶

The general rule pertaining to seamen injured in leaving and returning to their respective vessels, is that accidents sustained

73. *Davidson & Co. v. M'Robb*, (1918), A. C. 304; *Fletcher v. "Dutchess"* (Steamship Co.), 1912 W. C. & Ins. Rep. 16.

74. *Moore v. Manchester Liners, Ltd.*, 3 B. W. C. C. 527, (1910) App. Cases 498, 79 L. J. K. B. 1175, 3 N. C. C. A. 269; *Jackson v. General Steam Fishing Co., Ltd.*, (1909), App. Cas. 523, 2 B. W. C. C. 56, 3 N. C. C. A. 274.

75. *In re Claim of Bennie House*, Op. Sol. Dep. C. & L. (1915), 325.

76. *Ocean Acc. and Guar. Corp. v. Indus. Acc. Com.*, 173 Cal. 313, 159 Pac. 1041.

after reaching the pier on leaving the ship and before leaving the pier to board the ship, or attempting to board the ship by a dangerous way, do not arise out of and in the course of the employment.⁷⁷

Where a seaman is rightfully away from the ship, or away on business of the ship, and is injured when leaving or returning to the ship, while using the usual means of boarding the vessel, the accident arises out of and in the course of the employment.⁷⁸

§ 271. **Away From Regular Place of Employment on Business of The Employer.**—A cook on a boat was drowned while returning with purchased provisions. It was part of his duty to look after the securing of necessary provisions. In holding that the accident arose out of and in the course of the employment the

77. *O'Brien v. Star Line*, (1908), 45 Scotch L. R. 935; 1 B. W. C. C. 177; *Martin v. Fullerton & Co.*, (1908), 45 Scotch L. R. 812, 1 B. W. C. C. 168; *Gilbert v. Owners of "Nizan"*, (1910), 3 B. W. C. C. 455, *Hewitt v. "Dutchess"*, (1910), 102 L. T. 204; 3 B. W. C. C. 239; *Fletcher v. "Dutchess" Owners of*, (1911), 4, B. W. C. C. 317; *Kelley v. Owners of "Foam Queen"*, (1910), 3 B. W. C. C. 113; *Nolan v. Porter & Sons*, (1909), 2 B. W. C. C. 106; *Kitchenham v. Owners of S. S. "Johannesburg"*, (1910), 4 B. W. C. C. 311; *Mitchell v. S. S. "Saxon"*, (1912), 5 B. W. C. C. 623; *Halvorsen v. Slavesen*, (1911), 49 Sc. L. R. 27, 5 B. W. C. C. 519; *Frith v. S. S. "Louisianian"*, (1912), 5 B. W. C. C. 410; *Biggart v. S. S. "Minnesota"*, (1911), 5 B. W. C. C. 68; *Hyndman v. Craig & Co.*, 1910. 44 Irish L. T. 11, 4 B. W. C. C. 438; *McDonald v. Owners of Steamship "Banana"*, (1908), 1 B. W. C. C. 185; *Craig v. S. S. "Calabria"*, (1914), Sc. Court of Session, 7 B. W. C. C. 932; *Murray v. Allan Bros. & Co.*, (1913), 6 B. W. C. C. 215; *Griggs v. S. S. "Gamecock"*, (1913), 6 B. W. C. C. 15; *Lee v. Steamship "St. George"*, (1914), 7 B. W. C. C. 85.

78. *Boucher v. Olsen & Mahoney Steamship Co.*, 1 Cal. I. A. C. Part 2, 248; *Countryman v. Newman*, (1916), 7 N. Y. St. Dep. Rep. 421; *Kearon v. Kearon*, (1911), 45 Sc. L. T. 96, 4 B. W. C. C. 435; *Trodden v. J. McLennard & Sons*, (1911), 4 B. W. C. C. 190; *Richardson v. Owners of ship "Avonmore"*, (1911), 5 B. W. C. C. 34; *Keyser v. Burdick & Co.*, (1910), 4 B. W. C. C. 87; *Leach v. Oakley, Street & Co.*, (1910), 4 B. W. C. C. 91; *Jackson v. General Steam Fishing Co.*, (1909), A. C. 523, 101 L. T. 401, 2 B. W. C. C. 56; *Moore v. Manchester Liners*, (1908), 3 B. W. C. C. 527; *Canavan v. Owners of S. S. "Universal"*, (1910), 3 B. W. C. C. 355; *Robertson v. Allan Bros. & Co.*, (1908), 98 L. T. 821, 1 B. W. C. C. 172; *Webber v. Wansborough Paper Co.*, (1914), 7 B. W. C. C. 795.

court quoted the following general rules: "The Massachusetts court in McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306 tersely said: 'An injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform.' Westman, at the time of his death, according to the record, was doing, at a time, at a place and of a nature, the duties which his employment reasonably called him to perform. His injuries were received in the course of his employment. The great weight of authority sustains the view that these words 'arising out of' mean that there must be some causal connection between the conditions under which the employee worked and the injury which he received. Westman's accident was a natural incident of his work, the risk was one occasioned by the nature of his employment, the injury was traceable to the nature of his work and to the risks which his employer's work exposed him. We feel assured that the fatality arose out of the employment.'"⁷⁹

A teamster who slipped and fell on the door step of a customer, while collecting a load, was held to have sustained an accident arising out of and in the course of the employment.⁸⁰

Applicant went ashore on business of the ship, and after accomplishing the object of his errand started for the docks. A tram car passed, which he believed to be going to the docks and the last car of the evening, and it being his duty to get back, he tried to board the moving car and fell under it, sustaining a crushed foot. In denying compensation, the court held that the applicant had taken upon himself an added risk or peril not incident to his employment, and, therefore, that the accident did not arise out of the employment.⁸¹

An employee engaged in hauling coal discovered that there was no chute on the wagon, and in accordance with instruction crossed the street to telephone in for one. He was struck by a car when

79. Westman's case, 118 Me. 133, 106 Atl. 532, 4 W. C. L. J. 213.

80. Heinze v. Indus. Com., 228 Ill. 342, 123 N. E. 598, 4 W. C. L. J. 361.

81. Byrne v. Larrinaga Steamship Co., Ltd., (1918), W. C. & Ins. Rep. 319, 18 N. C. A. A. 1047.

crossing the street. The court held that the accident arose out of and in the course of the employment.⁸²

Two employees were out on business of their employer, and their automobile, through the negligence of the inexperienced driver, collided with another car, resulting in the death of one of the employees. It was not shown that the employer had designated the one who was to drive the machine. The court said: "We conclude that the act of Showalter in driving the automobile at the time in question was, in view of his inexperience in the handling of that particular machine, a mere act of negligence which was the proximate cause of the injury, but which act in no way interposed as a bar to prevent an award of compensation being made."⁸³

Where an employee had no regular hours of employment and was ordered to convey other employees to an outside job, and on his way back the automobile skidded and turned over, resulting in the death of the employee, it was held, that since he was at the time acting under the orders of his employer the accidental injury and death arose out of and in the course of the employment.⁸⁴

A teamster was killed by being struck by a passing automobile, when he got down from his wagon to collect bills scattered by the wind, while he was on an errand making deliveries. In affirming an award for compensation the court said: "In the case at bar the employment of Keaney to drive a team through the public streets and deliver goods required of him every reasonable and lawful effort to accomplish his task. His work did not require him to stay on his wagon. He was bound in the performance of his duty to use the street to deliver goods, to regain package or papers fallen from the wagon, as also to care for his horses, adjust the harness and repair the wagon, if necessary. It is manifest he might be injured while in the street in the performance of his

82. *Consumers Co. v. Cieslik*, —Ind. App.—, 121 N. E. 832 (1919), 18 N. C. C. A. 1040, 3 W. C. L. J. 620; *In re Samuel M. McIntire*, 2nd A. R. U. S. C. C. 242.

83. *Maryland Cas. Co. v. Indus. Acc. Com. Cal.*, 39 Cal. App. 229, 178 Pac. 542, 18 N. C. C. A. 1040, 3 W. C. L. J. 577.

84. *Rogers v. Rogers*, —Ind. App.—, 122 N. E. 778, (1919), 18 N. C. C. A. 1038, 4 W. C. L. J. 58.

duty, and it is plain his employment therein exposed him to the particular injury he received.⁷⁸⁵

A helper on a truck was killed while returning from making a delivery, when he was jolted from a running board, where he placed himself in order that he might make room for two girls, whom they picked up on the road. It was argued that because deceased gave up his place of safety in order that he might accommodate others, and not for the purpose of furthering his employer's business, he thereby departed from the course of his employment. The court of common pleas, confirming the award, said that if deceased had been injured while on the ground for the purpose of taking passengers, a different question would have been presented; but as he resumed his journey, he was undoubtedly in the course of his employment thereafter, regardless of the place where he chose to place himself on the truck. Affirming the judgment the court said: "When the husband and father of appellees was jolted from the truck of appellant, he was in the course of his employment with it. How he happened to be sitting where he was at the time he was jolted from the truck is utterly immaterial; and the judgment is affirmed on the opinion of the learned court below sustaining the action of the referee and the Compensation Board."⁷⁸⁶

Where an employee's work required that he cross a street to mail letters, and while so doing he was struck by a passing automobile, the court in holding that the accident arose out of and in the course of the employment, said: "The conditions under which the work here was required to be performed took Roberts upon the streets in the course of his employment in exactly the same manner as that in which a factory hand is subject to the dangers of the factory while in the course of his employment. There is a direct causal connection here between the fact that the man was on the street and the fact that he was injured. The accident was a natural accident of his work resulting from the exposure by

85. *Keaney's case*, 232 Mass. 532, 122 N. E. 739, (1919), 18 N. C. C. A. 1039, 4 W. C. L. J. 103.

86. *Siglin v. Armour & Co.*, 261 Pa. 30, 103 Atl. 991, 16 N. C. C. A. 895, 2 W. C. L. J. 556.

the necessity of his going upon the street while performing such work. He was not exposed to this danger of the street 'apart from his employment.' The causative danger was peculiar to the work, in that, had he not been on the street in the course of his duty, he would not have been injured."⁸⁷

An employee, engaged in delivering a window frame, accepted a proffered lift from a boy with a wagon and pony. The pony gave a sudden lurch, throwing the employee from the cart and injuring him. It was held that the applicant was doing work within the scope of his duty at the time of the accident and that the accident was due to a special risk incident to the employment. Therefore the accident arose out of and in the course of the employment.⁸⁸

Where an employee's duties required him to meet trains at a station, and while there he slipped and fell on ice, striking a rail and breaking his leg, it was held that the accident arose out of the employment, the court saying: "The conclusion that I have come to is this—that it is a complete error to attribute this accident merely to what was called a 'snow risk,' * * *. A railway station is, in one sense, a public place to which all members of the public have a right of access. * * * To my mind a railway station is, of itself, a place where those who are employed in connection with it necessarily run risks which are not common to members of the public in the ordinary sense at all. I can scarcely conceive that if a railway porter fell from the platform to the rails, and was either injured by the fall or run over by an engine, he would not be entitled to say, apart from special circumstances, that the accident arose out of the employment; and so it would seem to me, subject to a point which I conceive to be settled by authority in the workman's favor, would be the position of the claimant in this case."⁸⁹

87. *Globe Indem. Co. v. Indus. Acc. Comm. of Cal.*, 36 Cal. App. 280, 171 Pac. 1088, 16 N. C. C. A. 907, 2 W. C. L. J. 31; *Miller v. Taylor*, 173 App. Div. 865, 159 N. Y. S. 999, 12 N. C. C. A. 192.

88. *Mullinger v. Bidewell*, (1917), W. C. & Ins. Rep. 51, 15 N. C. C. A. 252.

89. *Blake v. Ramsey*, (1917), W. C. & Ins. Rep. 84, 51 Ir. Law Times Rep. 6, 15 N. C. C. A. 222.

A porter was delivering a parcel, and upon arriving at his destination he failed to find anyone in, and sat down to rest. While resting he fell down into the areaway below, sustaining injuries from which he died. It was held that there was no evidence tending to show that the deceased was subjected to any unusual risks, and that the accident did not arise out of and in the course of the employment.⁹⁰

Where a section foreman was killed after mailing pay checks in accordance with his duties, and while returning home, where he was required to be on call at the time to clean switches, it was held that the accident arose out of and in the course of the employment.⁹¹

In denying compensation for injuries sustained while running across a street to obtain material for his employer, the court said: "I think this is a plain case. The man was crossing the road, and was knocked down by a tramcar. There is no suggestion that he was told to run across the street. It seems to me that it is the common case of a street accident not in any way arising out of the employment."⁹²

A railway policeman was struck by an engine and killed when he was crossing a track, while returning from depositing cash boxes in a bank, which was part of his duties. It was held that the accident arose out of the employment.⁹³

A fireman, employed in the canal zone, was injured while performing service outside of the territory which was under the control of the United States. It was held that he was injured in the course of the employment.⁹⁴

Where the duties of an employee consisted in setting up machinery and driving automobiles in his employer's business, and he was killed by the overturning of his automobile, it was held

90. *Kettle v. McKay & Ryland*, (1916), W. C. & Ins. Rep. 297, 15 N. C. C. A. 220.

91. *Papinaw v. Grand Trunk Ry. Co. of Canada*, 155 N. W. 545, 12 N. C. C. A. 243, 139 Mich. 441.

92. *Symmonds v. King*, (1915), W. C. & Ins. Rep. 282.

93. *Grant v. Glasgow & So. Ry. Co.*, 45 Sc. L. R. 128, (1907), 1 B. W. C. C. 17; *Bett v. Hughes*, (1914), 8 B. W. C. C. 362.

94. *In re Claim of James Nellis*, Op. Sol. Dep. C. & L. (1915), 221.

that the accident arose out of and in the course of the employment.⁹⁵

Where a driver was killed by falling material from a building under construction on a public street, it was held that the injury arose out of the employment.⁹⁶

Where an errand boy was struck by a train while traveling a customary route on an errand for his employer delivering checks, it was held that the accident arose out of and in the course of employment.⁹⁷

An employee was killed when the engine he was driving crashed through a bridge. At the time of the accident the employee was moving the engine from one place, where he had completed the job he was engaged in, to another place where the engine was to be used. It was held that the injury arose out of and in the course of the employment.⁹⁸

Where a construction foreman arrived at the place of his employment thirty minutes prior to the time for beginning work, and proceeded across the street to telephone concerning the day's work, the 'phone being ordinarily used for that purpose, it was held that an injury sustained in crossing the street arose out of the employment. A reasonable time before and after working hours is allowed as included within the term of employment, and the previous acquiescence of the employer in the practice of using public telephones justified the foreman in using it upon this occasion.⁹⁹

Where the master of a schooner was ashore on ship's business, and slipped upon an orange peeling and fell, sustaining injuries to his hip of a permanent character, it was held that while the accident occurred in the course of the employment it did not arise

95. *State ex rel. Nelson Spelliscy Co. v. District Court of Meeker County*, 128 Minn. 221, 150 N. W. 623, 11 N. C. C. A. 636.

96. *Mahowald v. Thompson-Starrett Co.*, 134 Minn. 113, 158 N. W. 913.

97. *Chicago Packing Co. v. Industrial Bd.*, 282 Ill. 497, 118 N. E. 727.

98. *Pace v. Appanoose County*, 184 Iowa 498, 168 N. W. 916, 2 W. C. L. J. 884.

99. *Mueller Const. Co. v. Indus. Bd. of Ill. et al.*, 283 Ill. 148, 118 N. E. 1028, 1 W. C. L. J. 943.

out of the employment, but was a risk to which the commonalty was exposed. Compensation was denied.¹

Where a salesman slipped and fell while on the way to the home of a prospective customer and fractured his shoulder, the injury was held to have arisen out of and in the course of his employment.²

Compensation was awarded for an injury received by a workman as he was returning to his employer's office after completing a piece of work for the employer at another place.³

Where a repair man on cars was injured when he went to secure a measurement from a car in the yards, his injuries were caused by an accident arising out of the employment.⁴

In a Kansas case it was said: "The court concludes that the word 'about,' as applied to a mine, fixes the locality of the accident for which compensation may be recovered, and that the accident must occur in such close proximity to the mine that it is within the danger zone necessarily created by those peculiar hazards to workmen which inhere in the business of operating the mine. If the accident occurs outside this zone, the distance from the mine, whether very near or very far, is immaterial. In this case the workman was a messenger who had left one mine on an errand and had not arrived at the other. He was injured on the premises of the railway company, which lay between the two mines."⁵

Where an employee of a commission merchant, while crossing a street, during working hours in his working clothes to get refreshments in pursuance to a custom of the employees was injured, while talking to a prospective customer. It was held the accident arose out of and in the course of his employment.⁶

1. *Chapman v. Pearn* (owners of), 9 B. W. C. C. 224, 12 N. C. C. A. 368.

2. *Gaffney v. Travelers' Ins. Co.*, Mass. W. C. C., (1913), 339, 7 N. C. C. A. 429.

3. *Coeman v. Gullfooy Cornice Works*, (Cal.), 1 Nat. Comp. Journ. (1914), 18, 7 N. C. C. A. 429.

4. *Meyers v. La. Ry. & Nav. Co.*, — La. —, 74 So. 256, 1 W. C. L. J. 705.

5. *Bevard v. Skidmore-Patterson Coal Co.*, — Kan. —, 165 Pac. 657, 1 W. C. L. J. 597.

6. *State Industrial Comm. v. Voorhees*, — App. Div. —, (1920), 18, 4 N. Y. S. 883, 7 W. C. L. J. 238.

§ 272 **Street Accidents.**—Deceased was an engineer by profession, and had no fixed hours of service. He was sent out by his employer to examine gas burners and to report back. Upon his return he arrived in the city in the night, and was struck by an automobile and killed while going home to sleep for the night. The court in holding that the accident arose out of and in the course of the employment said: "Since deceased was compelled to return to the city at an hour when he could not at once communicate with his superior, and had to stay somewhere until he could report, he cannot be charged with a departure from his employer's service because, when hurt, he was going to his home for a lodging rather than to a hotel; hence the findings of the referee are ample to sustain the ultimate conclusion upon which the award of compensation rests, to the effect that plaintiff's husband met his death by accident during the course of his employment with the defendant company."

A laundry driver was struck and injured by an auto truck while he was carrying laundry from a hotel to the laundry. He had forgotten to collect it when his team was hitched up, so while his horses were eating, he proceeded to carry it to the laundry, in order that it would be there on time. He sued the defendants in a common-law action, and they pleaded that all the parties were under the compensation act and that the suit should come under the compensation act. The court so held and retained the case for determination according to the compensation act. "The Court was right in holding, as a matter of law, that the injury to the plaintiff arose out of his employment. It was a street risk to which the work subjected him. This should be understood to be settled law in this state as it is generally in other states. *Mahowald v. Thompson-Starrett Co.*, 134 Minn. 113, 158 N. W. 913, 159 N. W. 565; and cases cited; *Kunze v. Detroit*, etc., 192 Mich. 435; 158 N. W. 851, L. R. A. 1917A, 252, *Burton Auto Transfer Co. v. Ind. Acc. Com'r.* (Cal. App.) 174 Pac. 72; *Keaney's case*, 232 Mass. 532, 122 N. E. 739; *Globe Ins. Co. v. Ind. Acc. Co.*, 36 Cal. App. 288,

7. *Haddock v. Edgewater Steel Co.*, 263 Pa. 120, 106 Atl. 196, (1919), 18 N. C. C. A. 1041, 3 W. C. L. J. 786.

171 Pac. 1088; *Consumers' Co. v. Ceislik* (Ind. App.) 121 N. E. 832; *Bachman v. Waterman* (Ind. App.) 121 N. E. 8. It is now the definitely settled law in England. *Dennis v. A. J. White & Co.*, (1917), App. Cas. 479; *Arkell v. Gudgeon*, 118 L. T. R. 258. The injury arose in the course of the employment of the plaintiff. It is true that he was not using his delivery wagon and that it was not customary to carry laundry as he was doing at the time; but he was working in furtherance of his employer's interest. The laundry was received by the laundry company after the accident and laundered. He did not step aside from his work for some purpose of his own but was actually furthering the business of the company. It had never told him to do or not to do as he did. Such an occasion had not arisen. It is clear that if an injury had not intervened there would have been no thought of criticism. It would be too severe a rule that would permit a finding, if the proceeding were against the laundry company under the Compensation Act, that the plaintiff was not in the course of his employment. The result here should be the same. The holding that, as a matter of law, the injury arose out of the employment was right. The cases on principle, and some with somewhat resembling facts, support the rule. *Mahowald v. Thompson-Starrett Co.*, 134 Minn. 113, 158 N. W. 913, 159 N. W. 565, *State v. District Court*, 141 Minn. 61, 169 N. W. 274; *State v. District Court*, 172 N. W. 897; *Grieb v. Hammerle*, 222 N. Y. 382, 118 N. E. 805; *Mueller Con. Co. v. Ind. Board*, 283 Ill. 148, 118 N. E. 1028, L. R. A. 1918F, 891, Ann. Cas. 1918E, 808; *Kunze v. Detroit, etc.*, 192 Mich. 435, 158 N. W. 851, L. R. A. 1917A, 252; *Robinson v. State*, (Conn.), 104 Atl. 491; *Frint Motor Co. v. Ind. Com.*, 168 Wis. 436, 170 N. W. 285; *Dennis v. A. J. White & Co.*, (1917), A. C. 479; *Arkell v. Gudgeon*, 118 L. T. R. 258."*

An employee's duties necessitated that he write letters and mail them at a street box. While crossing the street, after mailing a letter, on his return to his place of employment, he was struck and injured by an automobile. In affirming an award

8. *Hansen v. N. W. Fuel Co.*, 144 Minn. 105, 174 N. W. 726, 5 W. C. L. J. 284.

for compensation the court said: "The conditions under which the work here was required to be performed took Roberts upon the street in the course of his employment in exactly the same manner as that in which a factory hand is subjected to the dangers of the factory while in the course of his employment. There is a direct causal connection here between the fact that the man was on the street and the fact that he was injured. The accident was a natural accident of his work resulting from the exposure occasioned by the necessity of his going upon the street while performing such work. He was not exposed to this danger of the street 'apart from his employment.' The causative danger was peculiar to the work, in that, had he not been on the street in the course of his duty, he would not have been injured. * * *

The petitioner contends that, because Roberts was exposed only to the ordinary perils of the street to which any other person is exposed, he does not fall within the rule which awards compensation for an injury arising out of the employment of the injured man. When the logical result of the application of the rule for which petitioner is contending is considered, the justice of treating this case as one arising out of Roberts' employment is apparent. Consider the case of a messenger boy. He is in no greater peril on the street than any other person there. He carries perhaps his message in his pocket, leaving his arms disengaged and perfectly free to move about. But he is on the street constantly in the course of his employment. To hold that Roberts is not entitled to compensation would be to hold that this messenger boy would likewise not be entitled to compensation for an injury caused to him by the perils of the street. The illustration might be extended further to truck drivers, teamsters, and numerous other classes of employment whose followers use the streets in the regular course of their duty, and whose peril on the streets is no greater than that of any other person, but who would not be injured but for the fact that their duty takes and keeps them on the street. It does not seem to us that the legislature ever intended that these persons should be excluded from the benefit of industrial accident compensation."

A motion picture employee reported for work and was informed that he would not be needed, but the employer's rules required him to remain at the plant for possible service during the day. The plant occupied the four corners of intersecting streets, and the thoroughfares were constantly used by employees in passing from one part of the plant to another. On the morning of the accident applicant crossed the street to change his coat preparatory to playing a game of chess and when returning he stopped in the street and engaged in conversation with fellow employees. One of the director's automobiles approached and struck him. In reversing an award based upon the theory that the accident arose out of the employment, the court said: "Even if it were conceded that injuries suffered by Stanley would have been compensable if they had resulted from an accident happening to him while actually traversing the street on the way from changing his coat, for his own convenience, to a contest of chess, for his own pleasure, we have by no means settled the matter. If we admit that the risk in crossing the street was a risk incident to his employment, upon the theory that, for the purpose of crossing and recrossing, the street was a part of the company's lot, we are yet afield. The thoroughfare was certainly not a part of the lot in the sense that Stanley might properly have loitered, or stood in social converse, upon it, as he might very properly have done upon any part of the lot located upon the corners of the intersection. When he stopped in the street he assumed a risk common to all who might sojourn there in the same manner. Under such circumstances his employer is not called upon to make compensation for his injuries. They did not arise out of his employment."¹⁰

A foreman of a street gang was struck and killed while crossing a street to talk to a friend. In holding that the accident happened at a place where deceased might reasonably be, consistently with the performances of his duties, the court said: "Finally, Robinson's employment as foreman did not require his

171 Pac. 1088, 16 N. C. C. A. 907, 2 W. C. L. J. 31; McDonald v. Great Atlantic & Pac. Tea Co., — Conn. —, (1920), 111 Atl. 65.

10. Balboa Amusement Producing Co. v. Indus. Acc. Comm. of Cal., 35 Cal. App. 793, 171 Pac. 108, 16 N. C. C. A. 906, 1 W. C. L. J. 747.

uninterrupted attention. No doubt he was expected to work on the road in the larger intervals of his supervisory employment, but was necessarily a foreman at all times, and his conduct must be measured accordingly. Upon the findings of the commissioner the case turns on the question whether one employed as a foreman of a repair gang on a much-traveled highway does or does not step outside of his employment as a matter of law, because he starts across the road, in response to a friendly salutation, for the purpose of conversation, when there is no evidence as to how long he intended to talk, and no evidence that his starting to cross the road did interfere, or that his intended conversation would have interfered, with the due performance of his work as foreman. We think this question must be answered in the negative."¹¹

A truck driver, whose duties were not limited to fixed hours, was ordered to take a pipe to the depot. The depot was closed so he stopped at his employer's office, where he usually stayed when not actively engaged, and when returning to his truck he was struck by a passing machine. It was held that the accident arose out of and in the course of the employment.¹²

A teamster was killed while passing a building in construction, when heavy beams fell upon him and crushed him to death. Plaintiff recovered a judgment at law against defendant, and the court held that since both parties were under the compensation act, the lower court should have reduced the verdict to the amount recoverable under the compensation act. The case was remanded with instructions accordingly.¹³

The general rule, supported by the weight of authority, is that when employees are injured on the street, from causes to which all other persons using the street are likewise exposed, the injury cannot be said to arise out of the employment. So where an em-

11. *Robinson v. State*, 93 Conn. 49, 104 Atl. 491, 17 N. C. C. A. 954, 2 W. C. L. J. 779.

12. *Burton Auto Transfer Co. v. Indus. Acc. Comm. of Cal.*, 37 Cal. App. 657, 174 Pac. 72, 17 N. C. C. A. 955, 2 W. C. L. J. 750.

13. *Mahowald v. Thompson-Starrett Co.*, 134 Minn. 113, 158 N. W. 913, 14 N. C. C. A. 904.

ployee whose business for the company required him to travel on the streets between the various establishments of his employer, slipped on an ice covered sidewalk while running to catch a street car and sustained injuries from which he died, the court, in refusing to make an award, said: "Slipping upon snow covered ice and falling while walking or running is not even what is known as peculiarly a 'street risk;' neither is it a recognized extra hazard of travel, or particularly incidental to the employment of those who are called upon to make journeys between towns on business missions. * * * This unfortunate accident resulted from a risk common to all, and which arose from no special exposure to dangers of the road from travel and traffic upon it. It was not a hazard peculiarly incidental to or connected with deceased's employment, and therefore is not shown to have a causal connection with it, or to have arisen out of it."¹⁴

Where a workman is sent into the public streets on his employer's business, whether habitually or occasionally, and he meets with an accident by reason of a risk of the streets to which his employment exposes him, the accident arises out of and in the course of his employment. Lord Finley, speaking for the House of Lords, gives the English rule on this subject as follows: "If a servant in the course of his master's business has to pass along the public street, whether it be on foot or on a bicycle or on an omnibus or car, and he sustains an accident by reason of the risks incidental to the streets, the accident arises out of as well as in the course of his employment. The frequency or infrequency of the occasions on which the risk is incurred has nothing to do with the question whether an accident resulting from that risk arose out of the employment. The use of the streets by the workman merely to get to or from his work of course stands on a different footing altogether, but as soon as it is established that the work itself involves exposure to the perils of the streets the workman can recover for any injury so occasioned. * * * The fact

14. *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310; *In re Edward J. McDonough*, 2nd A. R. U. S. C. C. 243; *In re Nelson L. Crape*, 2nd A. R. U. S. C. C. 286; *Orsinnie v. Lorraine* — Conn. — (1921), 113 Atl. 924.

that the risk may be common to all mankind does not disentitle a workman to compensation if in the particular case it arises out of the employment.^{'15}

A traveling salesman was injured by falling upon an icy street while going in pursuance of his duties, from the house of a customer to take a car to make another call. It was held that while the accident arose in the course of the employment, it did not arise out of it, as the danger of falling on the ice was not incidental or peculiar to his employment, but was a hazard common to every one using the streets. The court said: "The finding that the injury was received in the course of the employment was warranted. The question remains whether there was any evidence that the injury arose out of the employment. An injury arises out of the employment when there is a causal connection between the conditions under which the work is to be performed and the resulting injury. An injury cannot be found to have arisen out of the employment unless the employment was a contributing, proximate cause. If the risk of injury to the employee was one to which he would have been equally exposed apart from his employment, then the injury does not arise out of it. As was said by this court in McNicol's Case, 215 Mass. 497, at page 499, 4 N. C. C. A. 522, 102 N. E. 697, L. R. A. 1916A 306: 'The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant.'"¹⁶

15. *Dennis v. White & Co.*, (1917), A. C. 479, 15 N. C. C. A. 294; Also *Redner v. H. C. Faber & Sons*, 223 N. Y. 379, 119 N. E. 842, 16 N. C. C. A. 903, 2 W. C. L. J. 538; *Arkell v. Gudgeon*, 118 L. T. R. 258, (1917), 17 N. C. C. A. 958.

16. *Donahue v. Maryland Casualty Co.*, 226 Mass. 595, 116 N. E. 226, 14 N. C. C. A. 491, L. R. A. 118A, 215; *In re Betts*, 64 Ind. App.—, 118 N. E. 551, 16 N. C. C. A. 904; *International Harvester Co. of N. J. v. Indus. Board of Ill.*, 282 Ill. 489, 118 N. E. 171, 16 N. C. C. A. 912; *Charles R. Davidson & Co. v. M'Robb or Officer* (1918), A. C. 304, 16 N. C. C. A. 912; *Spencer v. "Liberty" (owners)* (1917), W. C. & Ins. Rep. 293, 16 N. C. C. A. 918; *In re O'Toole*, 229 Mass. 165, 118 N. E. 303, 16 N. C. C. A. 916; *Symmonds v. King*, (1905), W. C. & Ins. Rep. 282, 15 N. C. C. A. 254; *State ex rel. Miller v. District Court of Hennipin County*, 138 Minn. 326, 164 N. W.

Claimant was a traveling salesman. His employer was engaged in the manufacture of leather in New York City. The claimant occasionally visited the factory to procure samples. He was injured while riding in a public bus from White Plains to Port Chester, and was, at the time of the accident, engaged in his regular occupation of going from place to place for the purpose of selling goods. "Under group 32 of section 2 of the workmen's compensation law, the employer was engaged in a hazardous employment; but the claimant was not so engaged. The hazards incident to manufacturing leather goods in no manner menaced this claimant, riding along on the highway in a bus with other passengers. In fact, the vicissitudes of the claimant, as he journeyed from town to town, were not in the remotest degree affected by the character of the business carried on by his employer. His perils were not increased; his safety not diminished. It is not sufficient under the statute for the employer to be engaged in a hazardous employment; the claimants must have been so engaged."¹⁷

Deceased was a salesman for a lumber company, and while riding a motorcycle furnished by his employer, was struck by a train and killed. In affirming an award the court said: "Of course, the employer in this case was not in the business of operating a motorcycle for gain. Its business was not the operation of motorcycles in any sense. I think, however, that 'pecuniary gain,' as used in the statute, merely means that the employer must be carrying on a trade, business, or occupation for gain in order to come within the act. If, in that connection, the purpose of using the motorcycle is profit, that is enough."¹⁸

1012, 15 N. C. C. A. 256; *DeVoe v. N. Y. St. Rys.*, 218 N. Y. 318, L. R. A. 1917A, 250 113 N. E. 256, 15 N. C. C. A. 255; *Draper v. Regents of University of Mich.*, 195 Mich. 449, 161 N. W. 956, 14 N. C. C. A. 934; *Schroeder & Daley Co. v. Indus. Comm. of Wis.*, — Wis. —, 173 N. W. 328, 4 W. C. L. J. 576.

17. *Mandle v. Steinhardt & Bro.*, 173 App. Div. 515, 160 N. Y. Supp. 2, 14 N. C. C. A. 491; *Benton v. Frazer*, 219 N. Y. 210, 114 N. E. 43, 14 N. C. C. A. 492; *Sickles v. Ballston Refrigerating Storage Co.* 171 N. Y. App. 108, 156 N. Y. Supp. 864, 14 N. C. C. A. 493.

18. *Mulford v. Pettit & Sons*, 220 N. Y. 540, 116 N. E. 344, 14 N. C.

A solicitor and collector for a life insurance company was fatally injured by a street car, when running across the street to take a car while in route to solicit business at the directions of the employer. In holding that the injury arose out of the employment the court said: "In the case at bar, the workman to do the work of his employment must continually stand in danger of receiving an injury from accidents resulting from exposure to whatever risks and hazards are commonly attendant on the use of public streets and conveyances; which risks to him are greater because more constant than those that are incidental to the occasional and casual use of such streets by persons who use them in the ordinary way." ²⁰

Where an employee of a commission merchant, while crossing a street, during working hours in his working clothes, to get refreshments, in pursuance to a custom of the employees, was injured, while talking to a prospective customer, it was held the accident arose out of and in the course of his employment.²¹

C. A. 492; *Mueller Construction Company v. Indus Bd. of Ill.*, 283 Ill. 148, 118 N. E. 1028, 16 N. C. C. A. 902; *Scully v. Industrial Comm.*, 284 Ill. 567, 120 N. E. 492; *Keaney's Case*, 232 Mass. 532, 122 N. E. 739, 4 W. C. L. J. 103; *Malone v. Detroit United Ry. Co.*, 202 Mich. 136, 167 N. W. 96, 2 W. C. L. J. 293; *Coster v. Thompson Hotel Co.*, 102 Neb. 585, 168 N. W. 191, 16 N. C. C. A. 905; *Kunze v. Detroit Shade Tree Co.*, 192 Mich., 435, 158 N. W. 851, 15 N. C. C. A. 253; *London & L. Indem. Co. v. Indus. Acc. Comm.*, 35 Cal. App. 681, 170 Pac. 1074, 16 N. C. C. A. 909; *Beaudry v. Watkins*, 191 Mich. 445, 158 N. W. 16, 15 N. C. C. A. 254; *In re Raynes*, 64 Ind. App. —, 118 N. E. 387, 16 N. C. C. A. 909; *Putnam v. Murray*, 174 App. Div. 720, 160 N. Y. S. 811, 15 N. C. C. A. 256; *Indus. Comm. of Colo. v. Aetna Life Insurance Co.*, 64 Colo. 480, 174 Pac. 589 17 N. C. C. A. 955; *Bachman v. Waterman*, — Ind. App. —, 121 N. E. 8 17 N. C. C. A. 956; *McMinn v. Kern Brewing Co.*, 202 Mich. 414, 168 N. W. 542, 17 N. C. C. A. 957; *State ex rel. London & Lancashire Indem. Co. of America v. District Ct. of Hennipin County*, 141 Minn. 348, 170 N. W. 218, (1919), 17 N. C. C. A. 958.

20. *Morans Case*, — Mass. —, (1920), 125 N. E. 591, 5 W. C. L. J. 400.

21. *State Industrial Comm. v. Voorhees*, — App. Div. —, (1920), 184 N. Y. S. 888, 7 W. C. L. J. 238.

NON WORKING TIME INJURIES.

§ 273. **Miscellaneous Accidents Before And After Work Hours.**

Where a millwright, on leaving his employer's plant long after customary work hours, discovered a fire in the plant, and returned to the building to put it out, and lost his life in the fire, this evidence was held to support a finding that the accident arose out of and in the course of the employment. "He must have entered the building voluntarily, and knowing the possibility of danger in so doing from its being then on fire. But it is a reasonable inference that he did so for either one or both of these purposes: (1) Under the specific duty devolving upon him to have charge of and look after the valuable patterns essential for the work being done by his employer; (2) from the sense of obligation to use a reasonable amount of care to save his employer's property at a time of such emergency. As to each of these it needed no specific instructions from any superior to perform such services or voluntarily assume such responsibility while making an effort within the field of reasonable care to save the property of his employer. While so doing he cannot be considered, as a matter of law, to be a stranger. *McPhee's Case*, 222 Mass. 1, 4, 109 N. E. 633; *Munn v. Ind. Brd.*, 274 Ill. 70, 113 N. E. 110. We do not think that either the letter or the spirit of the Workmen's Compensation Act requires that such employee should be penalized for obeying such a natural and commendable instinct on his part."²²

A workman furnished his services and his team to the city of Minneapolis for stated daily compensation. He fed and stabled his team at his own expense. His work ceased at 5 in the evening. One evening after work he was caring for his horse in his stable when the horse kicked and killed him. The court said: "The facts stated give no right to compensation. The plaintiff's work for the day was done. He was not to do service for the city until the next morning. The horses were his and he fed and cared for them and furnished them and his wagon ready for work at a definite time. The accident did not arise out of his employment any more than

22. *Bell City Malleable Iron Co. et al. v. Rowland*, 170 Wis. 293, 174 N. W. 899, 5 W. C. L. J. 333.

would an accident which came while he was repairing his wagon or while doing other work in preparation for his next day's work for the city. The relator cites where a teamster, injured while caring for his horses after their work for the day was done, was allowed compensation. *Smith v. Price*, 168 App. Div. 421, 153 N. Y. Supp. 221; *Costello v. Taylor*, 217 N. Y. 179, 111 N. E. 755; *Suburban Ice Co. v. Industrial Board*, 274 Ill. 630, 113 N. E. 979. They involve situations where a teamster was doing work for his employer in the care of his employer's team and as a part of the work for his employer."²³

An employee on a tug boat was discharged for being intoxicated, instead of leaving the premises immediately, he remained therein for some time afterwards. His body was found later in the river in the vicinity of the pier. The court said: "If it be considered that, after the discharge of the deceased his employment continued a reasonable length of time to enable him to remove his belongings from the boat, it must nevertheless have ceased immediately upon his leaving it. It cannot be inferred that he fell into the water while in the act of leaving the boat, or prior thereto, rather than after leaving it he fell from the dock, while proceeding along its edge in an intoxicated condition. Indeed, it would seem that, if he fell while in the act of leaving, the engineer who saw him start for shore would have heard a splash of water when he struck it, or heard him cry for help. Only a mere guess leads to the conclusion that the deceased fell into the water prior to attaining a secure foothold upon the pier. There was no proof, therefore, that the deceased came to his death through an accident arising in the course of his employment."²⁴

Where a railroad engineer was injured by falling from his engine, while assisting in "spotting furnaces," the lower court found that the employee had been laid off for being intoxicated about an hour previous to the accident. This decision was reversed on appeal upon a finding against the employer on the question of

23. *State ex rel. Jacobson v. District Court of Hennipen County*, 144 Minn. 259, 175 N. W. 110, 5 W. C. L. J. 288 (1919); *In re Frank Fair*, 2nd A. R. U. S. C. C. 269.

24. *In re Whalen*, 186 App. Div. 190, 173 N. Y. S. 856, (1919), 18 N. C. C. A. 1037.

suspension, and it was held that therefore the accident arose out of and in the course of the employment.²⁵

An electrician received injuries due to the explosion of a dynamite cap when he lit a cigarette while preparing to begin work. Smoking was not prohibited about the premises. In reversing a decision of the lower court denying compensation the Supreme court held that the burden of showing that the injury arose both out of and in the course of the employment rested upon the claimant; that since the claimant was at the time in the shop preparing to start work, the injury occurred in the course of the employment; that a "causal connection between the employment and the injury * * * is shown by the use of dynamite caps upon the premises, and the presence thereof in the room where the plaintiff was regularly employed."²⁶

The plaintiffs, in two common law actions, were employees of the Northern States Power Company. The crew went from one place to another, in the performance of their duties in a truck furnished for that purpose by the employer. The employer did not undertake to convey his employees to and from work, but permitted any who chose to ride to go on the truck as far as it would go in their direction. On the evening of the accident the gang worked until 10 p. m., and several of the employees availed themselves of the opportunity of riding home on the truck. While en route the car collided with a street car, resulting in injuries to the two plaintiffs. The question in both cases was whether the injury was one which would come under the provisions of the Workman's Compensation Act or could the actions at law be maintained. The court decided, although they were riding on the truck of their employer, it clearly appears that their contract of employment imposed no obligation upon the employer to transport them to or from the place of work, and that they were merely riding as licensees to serve their own convenience. Their service for the day had terminated; they had left the place where such service had

25. *Dainty v. Jones & Laughlin Steel Co.*, 263 Pa. 409, 106 Atl. 194, (1919), 18 N. C. C. A. 1036.

26. *Rish v. Portland Cement Co.*, (Iowa), 170 N. W. 532, (1919), 18 N. C. C. A. 1032; *Bell's Case*, Mass. —, (1921), 130 N. E. 67; *Western Coal and Mining Co.*, Indus. Comm., — Ill. —, (1921), 129 N. E. 779.

been performed, and were no longer engaged in performing any service for their employer. Under such circumstances they were not within the provisions of the compensation law and the trial court ruled correctly.²⁷

Where an employee was working evenings, assisting other employees to install a recently moved plant of their employer, and pinched his finger, which later resulted in death, it was held that the accident arose out of and in the course of the employment.²⁸

A workman, who was feeling poorly was told to lay off until he would be able to go to work again. He returned the next morning and found a slip in his locker to be used in his day's work. He began work in accordance with the directions. Later in the day he was found dead. It was held that, since the relationship of master and servant was only temporarily suspended, when deceased returned and began work according to the directions on the slip, the relationship of master and servant was again established, and the accident arose out of and in the course of the employment.²⁹

Where a fireman in an office building died from the effects of inhaling fumes while attempting, after work hours, to put out a fire in the boiler room, it was held that the accident arose out of and in the course of the employment.³⁰

Several employees were waiting on a pier until a boat departed in order that they might begin work. During this time a scavenger drove up to the pier and began to unload rubbish. The men walked over towards the wagon to watch the man unload it. A dynamite cap, which was among the rubbish, exploded and killed claimant's husband. Neither the pier in question nor the wooden dock was controlled nor owned by the defendant. It was held that

27. *Erickson v. St. Paul City Ry. Co.* and *Omalley v. Same*, 141 Minn. 166, 169 N. W. 532, 3 W. C. L. J. 154; *Otto v. Duluth St. Ry. Co.*, 138 Minn. 132, 164 N. W. 1020.

28. *Perdew v. Nufer Cedar Co.*, 201 Mich 520, 167 N. W. 868, 2 W. C. L. J. 313.

29. *Chicago Cleaning Co. v. Indus. Bd. of Ill.*, 283 Ill. 177, 118 N. E. 989, 1 W. C. L. J. 940, 16 N. C. C. A. 928.

30. *Munn v. Industrial Bd. of Ill.*, 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652.

there was no causal connection between the conditions under which the work was required to be performed and the resulting injury, and the risk was not incident to the employment but common to all persons in the vicinity.³¹

Where a workman was found dead in a room, where he was working overtime lifting hot damp cloth in a damp room, and medical testimony was to the effect that death was due to exertion of his work in a hot room and a weak heart, but that with either of these factors absent he would not have died. The court held that the evidence warranted a finding that the deceased received a personal injury arising out of and in the course of the employment.³²

It was customary for porters in a hotel to leave the place when off duty or be subject to call when the clerk saw fit to direct them to perform some duty if they remained around the hotel. Deceased was off duty and was found dead in an elevator used for freight purposes. It was held that, in the absence of any positive evidence to substantiate a finding that deceased was performing some duty connected with his employment when he met his death, an award could not be allowed to stand.³³

Compensation was denied for the death of an employee who was killed while on his way to have his watch tested after working hours, in accordance with a rule of the company which required that every employee should have his watch tested every two weeks. The employee was not paid for the time consumed in making the test. The court held that deceased was not employed to have his watch tested and therefore was not engaged in any duty connected with the employment when injured. His risk was that of the commonalty.³⁴

31. *Buvia v. Oscar Daniels Co.*, 203 Mich. 73, 168 N. W. 1009, 17 N. C. C. A. 960.

32. *In re Mooradjian*, 229 Mass. 521, 118 N. E. 951, 16 N. C. C. A., 920, 1 W. C. L. J. 812.

33. *Savoy Hotel Co. v. Indus. Bd. of Ill.*, 279 Ill. 329, 116 N. E. 712, 15 N. C. C. A. 232.

34. *De Voe v. N. Y. State Rys.*, 218 N. Y. 318, L. R. A. 1917A, 250, 113 N. E. 256.

Where a bridge worker was struck by lightning, while sitting in a tent provided by the employer as sleeping quarters for his employees, it was held that the accident was in the course of the employment, but did not arise out of the employment.³⁵

An employee's duties required him to take his employer's horse to the country on Saturday for pasture over Sunday, and then takes the horse back on Monday morning. While caring for the horse on Monday morning preparatory to starting for the city he was injured. It was held that the injury was received in the course of the employment.³⁶

Where a workman was injured while working a few minutes overtime, it was held that he was entitled to compensation for an accident arising out of his employment.³⁷

An employee was injured on his way home after putting up his team. The applicant was taking his books home to make the necessary entries for the day. There was a place provided for this at the laundry where he worked. It was held that the accident did not arise out of nor in the course of the employment.³⁸

Where a workman off duty went upon a bin, to talk with a man emptying gravel, about going home the following Sunday, and when leaving voluntarily and with no emergency for immediate action, attempted to empty a box of gravel, and in so doing fell overboard and was drowned, the accident was deemed not to have arisen within the course of his employment.³⁹

A traveling salesman, asphyxiated in a hotel through the negligence of the hotel management, did not die from accidental injuries arising out of the employment, the accident had no relation to the employment. The decedent was not doing anything for the employer at the time.⁴⁰

35. *Griffith v. Cole Bros. et al.*, 183 Ia. 415, 165 N. W. 577, 1 W. C. L. J. 368.

36. *In re Chase*, Ohio St. Liab. Bd. of Awards, (1913), 7 N. C. C. A. 414.

37. *Gordon v. Eby*, 1 Cal. I. A. C. D., (1914), 13, 4 N. C. C. A. 858, 7 N. C. C. A. 426.

38. *Ogilvie v. Egan*, 1 Cal. I. A. C. D., 79, (1914), 7 N. C. C. A. 426.

39. *In re Claim of Simpson*, Op. Sol. Dep. C. & L. (1915), 251.

40. *Kass v. Hirschberg, Schultz & Co.*, 151 App. Dis. 300, 181 N. Y. Supp. 35, 5 W. C. L. J. 879.

In a Pennsylvania case in which it was held that the employee was not entitled to compensation, the court said:

"In the present case the deceased was but an ordinary day laborer, with fixed working hours, without the limits of which his employer was not privileged to call upon him for his services without additional compensation. He had been ordered by his foreman to appear before the company's physician at Ronce for a physical examination on the evening of December 20, 1917. He did not appear at that time and place, but voluntarily appeared at the home of the physician at Masontown the next evening, thus determining for himself when and where he would submit himself for examination. He was not being paid for the time he consumed undergoing the examination or in going to and from the place of examination. He was not injured while performing any duty which he was employed to perform, nor while actually engaged in the furtherance of the business or affairs of his employer."⁴¹

It was held under section 2 subsection (d) of the Tennessee Act that where a laundry employee was injured while pressing a skirt for the accommodation of a fellow employee after working hours and on a day when individual laundry work was forbidden, the injury did not arise "out of and in the course of the employment."⁴²

Where an employee was injured while "deadheading" into the terminal after work hours, having obtained permission from the train dispatcher, to ride the engine into the terminal after work had ceased, and for which time he was to receive pay, his injuries arose out of and in the course of his employment.⁴³

A custom among the shot firers of a mine required the firers to return in a reasonable time after shots were fired to see if all had exploded before turning the work over to the next shift. A miner, who after hours returned for that purpose, was shot by a mine guard who was negligent in the performance of his duties.

41. *Wilson v. H. C. Frick Coke Co.*, — Pa. —, 110 Atl. 723, 6 W. C. L. J. 502.

42. *Hinton Laundry Co. v. De Lozier*, — Tenn. —, 225 S. W. 1037, (1920), 7 W. C. L. J. 360.

43. *Payne v. Indus. Comm.*, — Ill. —, 1921, 129 N. E. 830.

It was held that the employee was injured in the course of his employment.⁴⁴

Where a servant built a fire to warm himself in the morning before beginning work and caused an explosion, on the surface above the mine where he was employed, which resulted in his injury, he was not entitled to the protection of the act.⁴⁵

Where a mail carrier was injured when going to the post office after hours to pack his mail for the following day's trip in response to an order of his superior, he was entitled to compensation.⁴⁶

§ 274. **During Temporary Cessation of Work at the Direction of Employer And For Own Purposes.**—A boy returning from the toilet crossed over a crane track to ask another employee the time. While crossing the track a bale of cotton, which was being rolled from a cart for the purpose of being loaded on a truck, fell and struck him as he was standing between the rails. The county court denied compensation on the ground that he had departed from his employment in crossing to the 4-foot way which lay beyond the way he usually took in going to the toilet. On appeal the court held that such departure was not one that would disentitle him to compensation for the injury sustained.⁴⁷

A laborer's duties were to move the track, upon which a crusher traveled, from the rear of the crusher and place it ahead of it. After completing his work, and while waiting for another employee to run the machine ahead, he sat upon the curb of the street. In the meantime a delivery wagon drove up, and he thought that the wagon could drive between him and the crusher without striking him, but unfortunately the wagon caught his leg, injuring it. The court held that the employee had a right to sit there, and that the accident arose out of and in the course

44. *Atolia Mining Co. v. Indus. Comm.*, — Cal. —, 167 Pac. 148, A. 1 W. C. L. J. 114.

45. *New Cornelia Copper Co. v. Espinoza*, — (1920), (Ariz.), (Cir. Ct. of App.), 268 Fed. 742.

46. *In re Elmer H. Watson*, 2nd A. R. U. S. C. C. 252; *In re Chas. D. McClendon*, 2nd A. R. U. S. C. C. 253.

47. *Corlett v. Lancashire & Y. Ry. Co.*, 120 L. T. R. 236, 18 N. C. C. A. 1043.

of the employment. In allowing compensation the court quoted the following from the case of *Tarper v. Weston-Mott Co.*, 200 Mich. 275, 166 N. W. 857; "The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."⁴⁸

An employee whose duties required his presence within a building, wandered out onto a switch track for purposes of his own, which were in no way connected with his employment. While there he sustained an injury, when a car was struck by another car, which other employees were spotting, thereby catching decedent under its wheels. It was held that the evidence failed to show that the accident arose out of and in the course of his employment.⁴⁹

Compensation was denied where a railroad section hand was killed by a stroke of lightning while in a barn, in which he had taken refuge from a storm at the direction of his foreman. It was held that being struck by lightning does not arise out of the employment.⁵⁰

An employee's duties included answering telephone calls, and when going to answer a call, which happened to concern his own personal business, he fell down stairs and sustained injuries. In allowing compensation the court said: "The evidence would warrant the conclusion that it was the duty of Cox to answer telephone calls even outside the usual business hours. If this was his duty, then the circumstances that the call happened to be one which interested him personally would not prevent his con-

48. *Malone v. Detroit United Ry. Co.*, 202 Mich. 136, 167 N. W. 996, 2 W. C. L. J. 293.

49. *Piske v. Brooklyn Cooperage Co.*, 143 La. 455, 78 So. 734, 2 W. C. L. J. 264; *Weiss Paper Mill Co. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 732, 6 W. C. L. J. 307; *Reeves v. J. A. Dady Corp.*, — Conn. —, 113 Atl. 162 (1921).

50. *Klawinski v. Railway*, 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342.

duct in attending to the call from being service arising out of and in the course of his employment.”⁵¹

A workman during working hours went upon his employer's roof to get cool. This was in violation of a rule of the employer, though the rule had become a dead letter through nonenforcement. The next day his body was found beside the building, where it would be if he had fallen from a portion of the roof not protected by a railing, which place was twenty three feet from a door giving access to the roof from the room in which the workman was employed. In holding that the accident arose out of the employment the court said: “The accident happened upon the premises of the employer and we think, in view of the practice which might have been found to exist under which the men went upon the roof for fresh air, that the act of the deceased in going there on a warm night was not necessarily outside his employment, but could have been found to be incidental thereto. An injury to a workman may arise out of and in the course of his employment even if he is not actually working at the time.”⁵²

Where an employee left his immediate place of employment and crossed over to bid a fellow employee good bye, when the latter was leaving for the army, and while leaning on an unguarded cogwheel he caught his fingers and was injured, it was held that the accident did not arise out of the employment, for at the time of the accident the injured employee was not engaged in performing a duty connected with his employment.⁵³

A girl stopped work just before noon and went in search of the boss to inform him that she did not feel well and would not return in the afternoon. Not finding him she proceeded to comb her hair to remove particles of wool that usually collected thereon. While doing so her hair became entangled in a pulley and her scalp almost torn from her head. It was a usual custom among the employees to remove these particles from their hair

51. *In re Cox*, (Mass.), 220, 114 N. E. 281, 15 N. C. C. A. 271; *St. Louis Sugar Co. v. Shraluka*, 64 Ind. App. —, 116 N. E. 330, 15 N. C. C. A. 271.

52. *In re Von Ette*, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641.

53. *Di Salvio v. Menihan Co. et al.*, 225 N. Y. 123, 121 N. E. 766.

before going home. It was held that the accident arose out of and in course of the employment.⁵⁴

The mere fact that the employee was resting for a moment when the accident happened is not sufficient to establish a termination of the relationship of employer and employee, so as to deprive the injured employee of compensation for disability.⁵⁵

But where injury resulted from playing ball during the rest period, compensation was denied under the Federal Act.⁵⁶

A foreman kept his horse at the place of employment and used him in his employer's business at odd times, but he was not required to, nor did he receive pay for it. Upon one occasion he forgot to bring the horse across a certain creek during working hours and an employee volunteered to go and get the horse and some liquor for his foreman after work, and was accidentally drowned. It was held that the employee did not meet with an accident arising out of nor in the course of his employment.⁵⁷

An employee was required to perform duties any employee had for him to do, and one of the employees directed him to make a toy boat for him. While performing this task, with the knowledge of the employer, he cut off one of his fingers. It was a rule of the company that if any special work was to be performed a special requisition, signed by the master mechanic, was to be procured. In this instance no such requisition was obtained. It was held that the employee was not engaged in performing any of the duties connected with his employment at the time of the accident. Compensation was denied.⁵⁸

"The rule as gathered from the decisions of the courts seems to be that where an employee is injured when not actually at work,

54. *Terlecki v. Strauss & Co.*, 86 N. J. L. 708, 92 Atl. 1087, 85 N. J. L. 454, 89 Atl. 1023, 4 N. C. C. A. 584.

55. *Northwestern Iron Co. v. Indus. Comm.*, 160 Wis. 633, 152 N. W. 416.

56. *In re Elizabeth Trevena*, 2nd A. R. U. S. C. C. 247.

57. *Wood v. Chico. Const. Co.*, 1 Cal. I. A. C. D., (1914), 7 N. C. C. A. 434.

58. *Bowers v. Detroit United Ry. Mich. I. A. Bd.*, 1 Nat. Comp. Jour., (1914), 22, 7 N. C. C. A. 433; *Cavero v. Hipolito Screen Co.*, 1 Cal. I. A. C. D., (1914), 9, 7 N. C. C. A. 434.

and when in a place where he has no right to be, or leaves his employment temporarily for some private purpose, and not his employer's business, he is not within the line of his duty at such time. But the rule is different where there is merely a temporary cessation of the work, or where the injury is received while on the employer's premises before commencing or after quitting work, or at the noon hour."⁵⁹

Where an employee engaged in driving a dray wagon, stopped for two minutes and crossed the street to get a glass of ale, and when returning he was run over and killed, it was held that he was entitled to procure reasonable liquid refreshment, and that the accident arose out of and in the course of the employment.⁶⁰

Work was temporarily suspended at the directions of the employer, and the applicant, together with other employees, took seats on the railroad track near the car on which they were working. While sitting there the cars were moved, and in an effort to arise the applicant was injured. It was held that he was still in the employment and compensation was awarded.⁶¹

"We are inclined to give the phrase 'in the course of employment' a somewhat liberal construction, and believe that an employee ordinarily should be considered as being in the course of his employment from the time he reaches his employer's premises until the time he leaves them, and so if injured at any time between the time of entering the employer's premises and departing therefrom he would be entitled to compensation, even though not actually engaged in work at the time of receiving the injury. But where during the hours of employment the employee temporarily quits the employer's premises for some purpose of his own and is injured, or where after the hours of labor and before leaving the employer's premises he goes to some other portion of the employer's premises for some private purpose of his own and is injured,

59. *In re Phillips Ohio St. Liab. Bd. of Awards*, (1913), 7 N. C. C. A. 433.

60. *Martin v. John Lovibond & Sons, Ltd.*, (1914), W. C. & Ins. Rep. 78, 5 N. C. C. A. 985.

61. *Robinson v. Kahl Const. Co., Ill. I. Bd.*, (1914), 7 N. C. C. A. 428.

it cannot be said that he is injured in the course of his employment."⁶²

An employer was engaged in piling billets, and between each time he was required to erect a pile, there was a lapse of some 15 minutes during which he had nothing to do. During this time he went over to another portion of the premises, and engaged in a conversation with another employee on matters personal to himself, and while so doing fell and was killed. It was held that deceased had departed from his employment and that the accident did not arise out of the employment.⁶³

An employee, who was injured when returning from a liberty loan meeting where he had gone at the direction of his superior was entitled to compensation under the Federal Act.⁶⁴

§ 275. **Going to Report to Employer.**—Compensation was denied for the death of an employee who was killed when he attempted to board a moving train in going to report to his employer. In holding that the accident did not arise out of the employment, the court said that, "In attempting to board a moving car the employee added peril to the usual hazard of the employment."⁶⁵

An employee in a cafe was required to go to defendant's shop in the evening after her work to report to her employer and to return the key. She was injured while crossing a railroad on her way to report. She might have taken a longer route and avoided the railroad. It was held that the accident arose in the employment but did not arise out of it.⁶⁶

Where a painter who was required to report to his employer's office at the end of the day's work, jumped upon a passing truck, and through the jolting of the truck was precipitated to the ground

62. *In re Mitchell*, Ohio St. Lab. Bd. of Awards, (1913), 7 N. C. C. A. 410.

63. *Swing v. Kokomo Steel & Wire Co.*, — Ind. App. —, (1919), 125 N. E. 471, 5 W. C. L. J. 380.

64. *In re John J. Simons*, 2nd A. R. U. S. C. C. 257.

65. *Jibb v. Chadwick*, (1915), W. C. & Ins. Rep. 342, 15 N. C. C. A. 248.

66. *Hadwin v. Shepherd*, (1915), W. C. & Ins. Rep. 503, 15 N. C. C. A. 245.

and injured, it was held that the injury did not occur as the result of an accident which arose out of a natural risk of the employment. The claim was denied. The commission said: "Had this claimant taken a street car and received an injury in consequence or suffered an injury while crossing the street or passing along the sidewalk, an entirely different question, and one very likely resulting in a different decision, would have been presented."⁶⁷

Where it was the duty of an employee to go to places away from the employer's office and return to the office to report, it was held that she was all this time acting within the course of her employment, and accordingly when she was injured while alighting from a street car, after returning from her errands elsewhere, she was entitled to compensation.⁶⁸

A conductor was killed by a landslide, while he was enroute to report the arrival of his train, at the point where the track was blocked by a previous landslide. This was the usual custom of conductors. It was held that deceased was acting in the course of his employment.⁶⁹

An employee arrived at work late in the morning and, believing that he would not be allowed to enter the mine after 7 a. m., started to his employer's office to report, and while on the way another of defendant's employees threw a bone from a car and struck plaintiff, fracturing his skull. In affirming a judgment the court held that the plaintiff was not at the time of his injury an employee of defendant within the meaning of the compensation act, and was entitled to his action at law.⁷⁰

§ 276. Lunch Hour Injuries, on the Premises and Going to Places off Premises for Luncheon.—An employee stopped in a

67. *Peers v. DeCarion & Co.*, 5 N. Y. St. Dep. Rep. 425, 12 N. C. C. A. 389.

68. *Turgeon v. Fox Co.*, 1 Cal. I. A. C. D., (1914), 7, 7 N. C. C. A. 429.

69. *Clark v. N. W. Pac. R. Co.*, 1 Cal. I. A. C. D., (1914), 6, 7 N. C. C. A. 428.

70. *Cox v. U. S. Coal & Coke Co.*, 80 W. Va. 295, 92 S. E. 559, 15 N. C. C. A. 271; *In re Jane H. Graves*, 2nd A. R. U. S. C. C. 264; *In re Thomas M. Custer*, 2nd A. R. U. S. C. C. 265.

room, which he had to pass through on his way back from luncheon, and sat down, holding a girl on his knee, until work time. In arising from his seat he placed his hand on a last of a monogram machine to assist himself in rising, when the stamping device of the machine came down upon his hand. "It is apparent from this recital of facts that there was no causal connection between the employment and the injury. It was no part of the employment to wait for 20 minutes under the circumstances disclosed in the packing room, although the employee was required to pass through it in a reasonable and orderly way to reach his labor. Whatever else may be said respecting his manner of spending that period of time, plainly it was no part of his duty and had no relations to it. The injury occurred while he was attempting to extricate himself from a posture and course of behavior utterly foreign to the business of the subscriber. That risk was not incidental to his employment. The subscriber was in no wise responsible for it. It was intentionally, intelligently and voluntarily incurred by the employee on an escapade of his own. Conditions may arise where the employee on the way to or on the return from meals may be injured on the master's premises as a rational result of the contract of service although not actually engaged at the moment in the work for which he was hired."⁷¹

A car inspector fell from a trestle on the premises of his employer, while on his way home to dinner, traveling over the railroad in preference to other ways, with the permission of the employer, and while receiving pay for the time necessary to go and come from his meals. After deciding that the case did not fall within the rule allowing compensation for accidents occurring upon the premises of the employer the court said: "Tested by the general character of the undertaking in which the deceased was engaged at the time of the accident the latter did not arise in the course of or spring out of his employment. Such a trip of an employee as he was taking is not under ordinary circumstances part of the employment. It is true that it has been held many times

71. *Rochford's Case* (Mass.), (1919), 124 N. E. 891, 5 W. C. L. J. 248; *In re Savage*, 222 Mass. 205, 110 N. E. 283; *Moore's Case*, 225 Mass. 258, 114 N. E. 204; *In re O'Toole*, 229 Mass. 165, 118 N. E. 303, 1 W. C. L. J. 620.

that, where an employer requests or customarily permits his employees to eat their meals upon his premises or in some place provided for them, the temporary interruption to their work thus caused will not be regarded as terminating their character as employees or as excluding them from the protection of such a law as our Compensation Act (Consol. Laws c. 67). *Highley v. Lancashire, etc. Ry. Co.*, 9 B. W. C. C. 496, 501; *Blovelt v. Sawyer*, 6 W. C. C. 16; *Mottis v. Lambeth Borough Council*, 8 W. C. C. 1. This view is in accordance with the rule which prevailed in negligence cases. *Heldmaier v. Cobbs*, 195 Ill. 172, 62 N. E. 853; *Riley v. Cudahy Packing Co.*, 82 Neb. 319, 117 N. W. 765; *Thomas v. Wis. Cent. Ry. Co.*, 108 Minn. 485, 122 N. W. 456, 23 L. R. A. (N. S.) 954. But no case has been cited or found where an employee going for such a purpose to his home or other place selected by him a substantial distance away from the 'ambit,' of his employment and from the employer's premises has been regarded as so engaged in the latter's business that an accident then happening to him would be held to be one arising out of and in the course of his employment. On the contrary, it has been uniformly held that it did not so arise. *Boyd on Workmen's Compensation* Section 481; *Ruegg on Employer's Liability & Workmen's Comp.* 377; *Brice v. Lloyd*, 2 B. W. C. C. 26; *Hoskins v. Lancaster*, 3 W. C. C. 476, 478, 479; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243.⁷²

A girl employee was injured while engaged in riding a truck, during her half hour intermission for lunch, according to a usual custom known to and approved by the employer. During the lunch period the employees were at liberty to remain on the premises or not as they might choose. It was held that the accident occurred in the course of the employment and arose out of the employment.⁷³

Where an employee was expected to eat lunch and spend the noon hour at a factory, and to use the elevator when the occasion demanded, and he was found crushed between the elevator and the

72. *McInerney v. Buffalo & S. R. Corp.*, 225 N. Y. 130, 121 N. E. 806, 3 W. C. L. J. 494.

73. *Thomas v. Proctor & Gamble Mfg. Co.*, 104 Kan. 432, 179 Pac. 372, 3 W. C. L. J. 712.

gate during the noon hour, it will, in the absence of direct evidence to the contrary, be presumed that the cause of the injury arose out of and in the course of the employment, and that at the time of the accident deceased was performing duties connected with his employment.⁷⁴

A crippled engineer, who was warned not to cross a certain railroad bridge when crossing the river, did use the bridge contrary to orders, and was struck by a train and killed, while on his way to luncheon. It appeared that the employer had provided no place for employees to lunch at the end of the bridge where they worked. There were other bridges across the river, but as to their location, with reference to the place of employment, there was a lack of evidence. The court said: "Inasmuch as an injury occurring during the noon hour only arises out of and in the course of the employment when the employee is using a way which he had a right to use and which was the only available way, or as safe as any other available way, to reach the place he was to eat his lunch, it was incumbent on the administratrix to establish those facts by competent evidence. The record is silent upon that question and simply does not show whether or not there was such an available way other than the crossing of the railroad bridge, * * * As it appears from the record that the deceased was violating an instruction of his employer, given by the superintendent in charge of the work, when the accident occurred, the injury cannot be said to have arisen out of and in the course of the employment."⁷⁵

An employee fell, while she was ascending the granite steps of her employer's premises, on her way back from lunch. She was carrying a Gladstone bag about 18 inches long and about a foot high, and a grip, with a sweater under her arm, all of which were her personal belongings. The board found that the fall was caused by accidentally striking her foot against the top step, that the employee was in good health, and no physical ailment or anything about her personal baggage contributed to her fall. The court, in

74. *Humphrey v. Indus. Comm. of Ill. et al.*, 285 Ill. 372, 120 N. E. 816, 3 W. C. L. J. 102.

75. *Nelson R. Const. Co. v. Indus. Com. of Ill.*, 286 Ill. 632, 122 N. E. 113, (1919), 18 N. C. C. A. 1035.

affirming the finding of the board that the hazard of falling was an incident of the employment and not a danger common to the community, and that her injury arose out of and in the course of her employment, said: "If the intestate had fallen and received the injuries she did while actively engaged in the performance of her duties, the risk and harm of that fall would have been an accident and hazard of her employment although the cause of her fall might rest in pure conjecture and speculation. * * * When the intestate fell she was not in the active performance of her duties, but was upon the premises of the subscriber and in its employment. * * * The risk of a fall upon machinery, upon steps or passageways or over obstructions to travel, is a hazard to a degree common to all persons who enter or seek to enter a manufactory or a mercantile building or other building for business or for pleasure."⁷⁶

Where an employee tripped, while going down stairs on his way out to lunch, and fell, sustaining injuries which caused his death, it was held that the accident arose out of and in the course of the employment, the court saying that, "the leaving of the premises where he was employed was so closely connected with the employment as to render it a necessary incident to it."⁷⁷

Where a hospital superintendent was struck and killed by a street car on his way home to dinner, compensation was disallowed, because of the insufficiency of the evidence to show that deceased's death arose out of and in the course of his employment.⁷⁸

Where an employee was sitting on a large piece of rubber in a room in the factory, at the noon hour, eating lunch, according to a custom tacitly consented to by his employer, when a pile of rubber fell upon him and broke his leg, it was held that at the time of

76. *Halletts' Case*, 232 Mass. 49, 121 N. E. 503, (1919), 18 N. C. C. A. 1022, 3 W. C. L. J. 481. For a former decision in the foregoing case see 230 Mass. 326, 119 N. E. 673.

77. *Hoffman v. Knisely Bros.*, 199 Ill. App. 530, 15 N. C. C. A. 235; *Johnson Coffee Co. v. McDonald*, — Tenn. —, (1920), 226 S. W. 215.

78. *Draper v. Regents of Univ. of Mich.*, 195 Mich. 449, 161 N. W. 956, 14 N. C. C. A. 934.

the accident the employee was performing a service growing out of and incidental to his employment.⁷⁹

An employee sustained serious burns as the result of an explosion of gasoline which occurred while deceased was lighting his pipe, in a tool house to which he and his companion had resorted for the purpose of eating their lunch. There were tools, some gasoline and a stove therein, the fire having been banked with sand and ashes. It was held that the accident arose out of and in the course of the employment, for the reason that deceased was doing a reasonable and natural thing in seeking shelter during the noon hour for the purpose of eating his lunch; that there was no evidence that he knew there was gasoline in the tool house and that it would vaporize and explode; that he violated no rule in so doing; and that the evidence was sufficient to sustain the conclusion that he was within, and entitled to compensation under, the act.⁸⁰

Where an employee fell into a river and was drowned, while going to a toilet during the lunch hour, compensation was allowed to his dependents. The court held that the accident arose out of and in the course of his employment.⁸¹

Where workmen were accustomed to place their bottles of coffee in the mouth of a galvanized pipe discharging heated air, and claimant was injured, by coming in contact with a revolving fan when he attempted to do so through a door in a different place, it was held that the accident did not arise out of the employment.⁸²

Where an employee was injured when he collided with another employee while running to the time clock when the whistle blew at noon, it was held that the accident arose out of the employment.⁸³

79. *Racine Rubber Co. v. Indus. Comm.*, 165 Wis. 600, 162 N. W. 664, 15 N. C. C. A. 280; *In re Francis W. Quinlin*, 3rd A. R. U. S. C. C. 171.

80. *Haller v. City of Lansing*, 195 Mich. 753, 162 N. W. 335, 14 N. C. C. A. 950.

81. *Milwaukee Western Fuel Co. v. Indus. Comm.*, 159 Wis. 635, 150 N. W. 988, 12 N. C. C. A. 77.

82. *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368.

83. *Rayner v. Sligh Furniture Co.*, 180 Mich. 168, 146 N. W. 665, 4 N. C. C. A. 851, L. R. A. 1916A, 22.

A foreman of a logging crew was found dead, upon the return of other members from lunch. He had evidently been killed instantly by an explosion of dynamite. It was customary to dynamite out any stumps which obstructed the roadways. It was held that the evidence was sufficient to warrant a finding that the employee's death was due to an accident that arose out of and in the course of the employment, and there was no evidence that the injury was self inflicted.⁸⁴

An employee who was working on top of a roof when he was called to lunch by the foreman, started to come down a rope instead of a ladder provided for that purpose, and was fatally injured. In holding that the accident arose out of and in the course of the employment the court said: "If when the call to come to lunch was made, Mr. Clem, in responding to the call, had inadvertently stepped into an opening in the uncompleted roof, or in company with others had in the attempt to reach the ladder got too near the edge of the roof and fallen and been hurt, would it be claimed that the injury did not arise out of and in the course of his employment? The getting of his luncheon under the conditions shown was just as much a part of his duty as the laying of a board or the spreading of the roofing material."⁸⁵

An employee, who was charged with the control and care of two horses, rode one to a watering trough at noon, contemplating riding him to his home afterwards, where he was going for lunch. Before reaching the trough the horse threw him and he sustained serious injuries which resulted in his death. It was held that the retention and control included the care of the horses, at least to the extent of seeing that they were given water and that during this time the deceased was within his employment. The accident arose out the employment, as the deceased was on his way to perform his duty at the time of the injury, although he may have had in mind at the time of the injury, the doing of

84. *Bekkedal Lbr. Co. v. Indus. Comm. of Wisconsin*, 168 Wis. 230, 169 N. W. 561, 17 N. C. C. A. 952.

85. *Clem v. Chalmers Motor Co. et al.*, 178 Mich. 340, 144 N. W. 848, 4 N. C. C. A. 876, L. R. A. 1916A, 352.

something else not within the scope of his employment, after watering the horses.⁸⁶

Where an employee was injured, while using the elevator provided for use in reaching the department where she worked, her injuries arose out of and in the course of her employment, even though she was leaving the building during the noon hour to purchase a theater ticket.⁸⁷

Where an employee sustained injuries while going to luncheon by falling on a stairway and spraining her ankle it was held that she was entitled to compensation, even though the employer had no control over the stairway, it being the only means of egress open to employees.⁸⁸

Where an employee, who quit work a minute before lunch time, was injured by overalls striking him in the eye when thrown at him in a spirit of play by a fellow employee, it was held that there was no interruption of the relation of employer and employee because of the fact that he was preparing to go to luncheon, and that the injury was therefore sustained in the course of the employment. In connection with this case it must be remembered that under the Ohio Act it is not necessary that the accident arise out of the employment.⁸⁹

Compensation was awarded for an injury sustained by an employee in getting down from a stool on which he had been eating at the place of his employment.⁹⁰

The English rule is that injuries received by employees while seeking refreshments are considered to have arisen out of and in the course of employment.⁹¹

86. *Pidgeon v. Employer's Liab. Assur. Corp.*, 216 Mass. 51, 102 N. E. 932, 4 N. C. C. A. 516.

87. *White v. Slattery*, — Mass. —, 127 N. E. 597, (1920), 6 W. C. L. J. 323.

88. *In re Sundine*, 218 Mass. 1, 5 N. C. C. A. 616, L. R. A. 1916A, 318, 105 N. E. 433; *Papineau v. Indus. Acc. Comm.*, — Cal. App. —, (1920), 187 Pac. 108, 5 W. C. L. J. 492.

89. *In re Mack*, Ohio I. C., (1914), 7 N. C. C. A. 432.

90. *Crouch v. Mass. Employee's Ins. Ass.*, Mass. W. C. C., (1913), 401, 7 N. C. C. A. 432.

91. *Carinduff v. Gilmore*, 48 Ir. Law Times 137, 7 B. W. C. C. 981; *Low v. General Steam Fishing Co.*, 25 Times L. R. 787, 53 Sol. Jo. 763;

A chauffeur's assistant had gone all day without food. In the evening, when returning, he left the truck to get something to eat, and was struck by a car which caused his death. The court said: "The natural inference from the proof, aided by the presumption of section 21 of the Workmen's Compensation Law (Consol. Laws, c. 67), leads to the conclusion that from breakfast until 4 o'clock, when the accident occurred, the deceased had had no food, and that, being hungry, he had started across the street to get some cakes with which he might presently stay his hunger, *Matter of Driscoll v. Gillen & Sons*, 226 N. Y. 12, 123 N. E. 863, affirming 187 App. Div. 908, 173 N. Y. Supp. 825. The case is comparable to those where employees are killed or injured while seeking shelter from a storm, or while going to a nearby place to answer the calls of nature. *Moore v. Lehigh Valley R. R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620; *Krawczyk v. Mac-Namara*,—App. Div.—, 173 N. Y. Supp. 912. It is wholly unlike those where accidents occur during the noon hour, when employees are on their way to or from the plant to get their noonday meals. In that class of cases injuries are received during a definite period set apart as belonging exclusively to employees, during which they may go where they choose and do what they please, subject to no orders from their employers and freed from all duty or responsibility in reference to their employment. In this instance the employe was at all times in the immediate vicinity of his employer's truck, which had stopped but momentarily, and his duty to care for it, to return to it, and help bring it home, had not ceased. It was not as if the truck had been placed in a garage, while the deceased upon his own time, had gone to a restaurant to get a meal. Nor was it as if the deceased had abandoned the truck, and had gone to a saloon or drug store, not to satisfy a need of eating, because of an omitted meal, but to regale himself with refreshing

Martin v. Lovibond, 7 B. W. C. C. 243; *Keenan v. Flemington Coal Co.*, 40 Scot. L. R. 144, 10 Scot. L. T. 409; *Earnshaw v. Lancashire & Y. R. Co.*, 5 W. C. C. 28; *Morris v. Lambeth Borough Council*, 22 Times, L. R. 22; *McLaughlin v. Anderson*, 48 Scot. L. R. 349, 4 B. W. C. C. 376; *Blovelt v. Sawyer*, 20 Times L. R. 105; *McKrill v. Howard*, 2 B. W. C. C. 460. A digest of the decision in each of the above cases can be found in L. R. A. 1916A, (note) 320. See also 7 N. C. C. A. (note) 431-433.

drinks and otherwise indulge himself, it was necessary for the continuance of his work that he should have eaten. The deceased was hungry, because his employment that day had left him without food many hours, and it was precisely as if the deceased had descended from the truck on a hot day to get a glass of water to satisfy his thirst. It seems to me that the deceased did not step out of his employment when he went toward the bakery to get some cakes to carry to the truck, in order to eat the same in the journey home, and that his death arose in the course of his employment.'⁹²

An employee of a city, during the noon hour of a day he had been hauling coal from a pile near a railroad, sat on the railroad track to eat his luncheon, and while leaning against a car, was injured when the car kicked or jostled by a locomotive. The court said: "The board was justified in finding, if not constrained to find, that the accident did not arise out of his employment. Haggard was not in a place in which it was necessary for him to be in the course of his work, or in going to or coming therefrom. The act in which he was engaged when injured had no relation to his employment; indeed, his going upon the railroad track seems to have been in violation of St. 1906, c. 463, part 2, sec. 232, although the decision of this case is not based on that statute. *Fumiciello's Case*, 219 Mass. 488, 107 N. E. 349; *Ross v. John Hancock Mut. Life Ins. Co.*, 222 Mass. 560, 111 N. E. 390; *Borin's Case*, 234 Mass. —, 124 N. E. 891. He chose 'to go to a dangerous place where he had no business to go, incurring a danger of his own choosing and one altogether outside any reasonable exercise of his employment.'⁹³

Where employees in the basement of a brewery habitually went to the ground floor for fresh air and refreshment during the noon hour, and one was killed by falling into an elevator shaft while getting fresh air, the court said: "If the deceased had been killed while eating lunch in this room, his death would have occurred in the course of his employment. *Matter of McNery v. B. & S. R. Corp.*, 225 N. Y. 130, 121 N. E. 806. If, during the lunch hour,

92. *Sztore v. James H. Stansbury, Inc.*, 189 N. Y. App. Div. 388, 179 N. Y. S. 586, 5 W. C. L. J. 427.

93. *Haggard's Case*. — Mass. —, (1920). 125 N. E. 565, 5 W. C. L. J. 397.

he fell down the elevator shaft while walking about on the ground floor to get the air, to go to the toilet, to warm up, to drink beer, or to rest, as cellar men were expected to do, his case could not logically be distinguished from the case assumed. It must be presumed that he was present on the ground floor for some one or more of these legitimate purposes of employment, that while so present he accidentally fell down the elevator shaft, and that while in the course of his employment he was killed.⁹⁴

A carpenter subject to dizzy spells, was not injured in the course of his employment, where he laid his hand upon a hot stove, while cooking his lunch, as a consequence of one of his dizzy spells.⁹⁵

Where a street car company employee rode home to lunch on defendant's car and alighted therefrom it was an incident of his employment. He was not out as a pleasure seeker or a church-goer. He was a motorman going home to dinner and his injury resulting from being struck by a passing car upon alighting was held to be an industrial accident to be born by the industry.⁹⁶

Injuries sustained by employees during lunch hour when they are at liberty to do as they please are not compensable under the Federal Act.⁹⁷

But when performing acts during the noon hour in the furtherance of duties of the employment injuries sustained are compensable.⁹⁸

Where board is furnished as part of the employee's pay, she has not departed from her employment when going to lunch.⁹⁹

Where an employee went to sleep on the ground near his wagon after eating his lunch at a place where he had a right to be and a mule fell upon his head, it was held that the injury was sustained

94. *Donlon v. Kips Bay Brewing & Malting Co.*, 189 N. Y. App. Div. 415, 179 N. Y. S. 93, 5 W. C. L. J. 429.

95. *Neuberger v. Third Ave. Ry. Co.*, 183 N. Y. S. 348, 6 W. C. L. J. 485.

96. *Manchester St. Ry. v. Barrett*, 265 Fed. 557, 6 W. C. L. J. 421, (1920).

97. *In re Chas. F. Lancaster*, 2nd A. R. U. S. C. C. 247; *In re Oscar Bern*, 2nd A. R. U. S. C. C. 248.

98. *In re Wm. E. Schneider*, 2nd A. R. U. S. C. C. 250; *In re Clifton L. Hedgpeth*, 2nd A. R. U. S. C. C. 258.

99. *In re Margaret Leffel*, 2nd A. R. U. S. C. C. 255.

while in the performance of duty and compensation was awarded under the Federal Act.¹

Where a servant was killed during the noon hour, when he attempted to stop his team from running away, the accident occurring at a place where he had a right to be in the performance of his duty, the death was due to an accident arising out of and in the course of the employment.²

§ 277. **Going to Receive Pay.**—Where an employee was injured while riding upon a logging train while on his way to obtain his pay, the commission found that the plaintiff was performing a service growing out of and incidental to his employment. In affirming the judgment the court said: "He was entitled under his contract to receive compensation for his services. His employer directed him to go to a place some distance from his work to get his pay and offered him the means of transportation for going there. He went in obedience to the duty placed upon him by his employer and acquiesced in by him, performing the last act under the contract, whereby each could receive the full benefit thereof. Had the employer paid him at the camp, a different question would be presented."³

A railroad employee on his way to receive his pay after completing his day's work and turning in his slip, walked 1000 feet alone and over the adjoining tracks to reach a point where he could catch a passing freight train to ride to a point where he could receive his pay. While so doing he was struck by a train and killed. There were many other and safer ways of reaching the street. The commission found that deceased had no authority to be at the place where the accident happened, and was not at such place on any business connected with his employment, but that he was there for purposes of his own. The accident did not arise out of nor in the course of the employment. The appellate court affirmed the findings of the commission.⁴

1. *In re C. B. Payne*, 3rd A. R. U. S. C. C. 171.

2. *Brown v. Bristol Last Block Co.*, — Vt. —, (1920), 103 Atl. 922, 5 W. C. L. J. 628.

3. *Hackley-Phelps-Bonnell Co. v. Indus. Comm.*, 165 Wis. 586, 162 N. W. 921, 15 N. C. C. A. 278.

4. *Ames v. N. Y. Cent. R. Co.*, 178 App. Div. 324, 165 N. Y. Supp. 84, 15 N. C. C. A. 279; *In re Oscar S. Reed*, 2nd A. R. U. S. C. C. 246.

A railway employee had finished his run and then had two hours off. He started to his dentist with the intention of stopping off on the way and receiving his pay. While en route the train of his employer on which he was riding collided with another, injuring plaintiff. The court held that the accident did not occur while the plaintiff was doing the duty he was employed to perform, nor was it a natural incident of his work, and therefore the plaintiff was entitled to his action for damages at common law.⁵

A collier returned to consult his foreman about a pay check with which the miner was dissatisfied. He did not intend to resume work unless the dispute was satisfactorily settled. Not gaining any satisfaction the collier proceeded to leave the premises and was knocked down by a coal wagon and was injured. It was held that the injury did not arise out of and in the course of the employment.⁶

Where a workman was employed in a blacksmith shop in which no power driven machinery was operated, and although his place of employment might not have been within the act, yet since it was operated in connection with the remainder of the employer's plant, and the employee had to go through a room where power driven machinery was operated to get his pay, he was entitled to the protection of the act when he suffered an injury through the horseplay of other employees while in the room where the power machinery was operated.⁷

A farm laborer was compelled to go about two miles to receive his pay and instruction for the next day's work. While en route, riding with a fellow workman, in the latter's cart he was thrown out and injured. It was held that the accident did not arise out of the employment.⁸

Where two employees were running a race to see who would first reach the paymaster's office and one slipped and fell on the polish-

5. *Pierson v. Interborough Rapid Transit Co.*, 184 N. Y. App. Div. 678, 172 N. Y. Supp. 492, 3 W. C. L. J. 186.

6. *Phillips v. Williams*, (1911), 4 B. W. C. C. 143.

7. *Pekin Cooperage Co. v. Industrial Bd.*, 277 Ill. 53, 115 N. E. 128.

8. *Parker v. Pont*, (1911), 5 B. W. C. C. 45; *Lasturka v. Grand Trunk & Pac. Ry. Co.*, (1913), Alberta Supreme Court, 7 B. W. C. C. 1031.

ed floor, it was held that the accident did not arise out of the employment.⁹

Where an employee was injured while standing in line to get his pay check it was held that the injury arose out of the employment.¹⁰

Where an employee was on his way, on his employer's premises, to obtain his pay and stepped on a casting which rolled and caused him to fall whereby his shoulder was dislocated, it was held that he had sustained an injury in the course of his employment.¹¹

The English rule is that where a workman remains on the premises or returns thereto to obtain his pay after work ceases, he is still acting in the course of his employment.¹²

§ 278. **Going to Answer a Call of Nature.**—A warehouseman was employed in a warehouse in which there were no toilet accommodations. While engaged in the course of his employment, deceased was required to answer a call of nature. He sought as a matter of necessity, shelter under a freight car which was moved, and he was killed. "We have no doubt that the trial court was fully justified, under the showing, in finding that the accident arose out of and within the course of the employment. It occurred during working hours. There were no toilet accommodations within two blocks. Decedent was of necessity compelled to attend to his call. Defendant was negligent in not providing accommodations in the warehouse. The necessity of decedent's immediately retiring to some available place, coupled with the absence of accommodations in the warehouse, gave rise to the danger."¹³

A workman was on his way to use a toilet, on the premises of and provided by the employer for the use of the employees when

9. *In re Atwell*, Ohio Indus. Comm., (1915), 12 N. C. C. A. 662.

10. *Garls v. Pekin Cooperage Co.*, Ill. Ind. Bd., (1914), 12 N. C. C. A. 552.

11. *In re Phillips*, Ohio St. Ind. Bd., (1913), 7 N. C. C. A. 429.

12. *Riley v. W. Holland & Sons*, (1911), 1 K. B. 1029, 4 B. W. C. C. 155; *Molloy v. South Wales Anthracite Colliery Co.*, (1910), 4 B. W. C. C. 65; *Nelson v. Belfast Corporation*, (1908), 42 Irish L. T. 223, 1 B. W. C. C. 158; *Riley v. W. Holland & Sons*, (1911), 104 L. T. 371, 4 B. W. C. C. 155; *Lowry v. Sheffield Coal Co.*, (1907), 24 T. L. R. 142, 1 B. W. C. C. 1.

13. *State ex rel. G. N. Express Co. v. District Court of Ramsey Co.*, 142 Minn. 410, 172 N. W. 310, (1919), 18 N. C. C. A. 1041.

a galvanizing tank exploded throwing molten metal upon him and severely injuring him. In a suit at law there was a judgment for the defendant. Affirming the judgment the court held that the accident arose out of and in the course of the plaintiff's employment, and that his remedy was under the compensation act, as he was injured on the premises and at the plant of his employer.¹⁴

Compensation was allowed for the death of an employee who was drowned by falling into a river on his way to the toilet, during the suspension of work for luncheon. The toilet had been provided for the use of the employees by their employer.¹⁵

Where the employer failed to provide a toilet and the employees used a place in another building belonging to the employer across the street, with his knowledge and assent, it was held that an employee, who was struck by a vehicle and killed while crossing the street to reach the toilet, suffered an accident arising out of and in the course of his employment.¹⁶

Where a boat's employee fell through a hatchway while going to relieve himself, the county court said that deceased had not gone so unnecessarily far that he had traveled outside of the scope of his employment, and held that the accident arose out of and in the course of his employment.¹⁷

The defendant did not have separate conveniences for women as required by law. Arrangements were made for use of those conveniences in the building of an adjoining employer. To reach these conveniences claimant had to cross a yard, and in doing so tripped upon a block of wood and fell, sustaining injuries. It was held that the accident arose out of and in the course of the employment.¹⁸

14. *Welden v. Skinner & Eddy Corporation*, 103 Wash. 243, 174 Pac. 452, 2 W. C. L. J. 860; *Neice v. Farmers' Co-operative Creamery & Supply Co.*, 133 N. W. 878, 90 Neb. 470.

15. *Milwaukee Western Fuel Co. v. Indus. Com. of Wis.*, 159 Wis. 635, 150 N. W. 998, 12 N. C. C. A. 76.

16. *Zabriskie v. Erie R. R. Co.*, 86 N. J. L. 266, 92 Atl. 385, 4 N. C. C. A. 778, L. R. A. 1916A, 315.

17. *Armstrong v. Gregson & Co.*, (1916), W. C. & Ins. Rep. 226, 15 N. C. C. A. 265.

18. *Fearnley v. Bates and North Cliffe, Ltd.*, (1917), W. C. & Ins. Rep. 207, 86 L. J. K. B. 1000, 15 N. C. C. A. 266; *Hanley v. Boston Elev. Ry.*

A hostler was engaged in hauling equipment from the show ground to the railroad, and left his team while he went to the toilet in his sleeping car. When returning to his team, and while he was crossing the tracks which lay between his car and his team, he was struck and injured by a switch engine. The court affirmed a finding that the accident arose out of and in the course of the employment.¹⁹

An employee was struck by something while she was in a toilet room, whereupon she looked through a crack to see where the article came from, when a girl in the adjoining room thrust a scissors through the crack and into her eyes, which resulted in an impairment of her vision. The commission found that the injury was due to an accident which arose out of and in the course of the employment. The appellate court reversed the finding of the commission holding that the accident was due to a sportive act of a co-worker, who in no way represented the master, and which act in no way grew out of or was connected with the employment.²⁰

Where a street workman stepped on a rusty nail while going to a nearby toilet, and lockjaw resulted, it was held that the accident arose out of and in the course of the employment.²¹

An employee resorted to a place to relieve his bowels, and when returning was struck by a train while crossing the railroad tracks. The employees were furnished a place for this purpose and the place to which claimant resorted was strictly forbidden to be used for the purpose. It was held that, since the applicant was returning from a forbidden act, and over a course essentially dangerous, the accident did not arise out of the employment.²²

Co., (Mass.), W. C. C., (1915), 12 N. C. C. A. 565; *Houston & T. C. R. Co. v. Turner*, 91 S. W. 562, 99 Tex. 547.

19. *Hagenback v. Leppert*, 64 Ind. App. —, 117 N. E. 531, 1 W. C. L. J. 64; *Madden v. Whitham*, 36 N. J. L. J. 113, 12 N. C. C. A. 556.

20. *De Fillippis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. S. 761, 12 N. C. C. A. 557.

21. *Putnam v. Murray*, 6 N. Y. St. Dep. Rep. 355, 12 N. C. C. A. 556; *Cino v. Morton & Gorman Contracting Co.*, 5 N. Y. St. Dep. Rep. 387, 12 N. C. C. A. 79.

22. *Senior v. Brodsworth Main Colliery Co., Ltd.*, 1917 W. C. & Ins. Rep. 284, 16 N. C. C. A. 918.

According to the English decisions, if an employee is injured while availing himself, or is in the act of going to avail himself of toilet facilities, the accident and injuries arise out of and in the course of the employment. If the employer furnishes adequate facilities, accidents to servants while seeking relief elsewhere at places of their own choice, are not covered by the compensation acts.²³

Where a servant was found dead in the vault of a toilet, where he had a right to go, and the circumstances tended to show that he was killed by falling therein, such evidence in the absence of evidence to the contrary warranted a finding that death was due to an accident arising out of and in the course of the employment.²⁴

§ 279. Injuries Sustained After Work Hours, by Employees Furnished Lodging on the Premises and to Employees Visiting the Premises on Sundays for Purposes not Connected With the Employment.—Where a lumber company's employee was required by his contract of employment to sleep on the premises and in a bunk furnished by the master, it was within the course of his employment for the servant to remain on the premises and use the bunk furnished for him, and when he suffered an injury by a straw from the upper bunk falling and lodging in his throat, the injury was a compensable one, for at the time of the injury he was in the employ of the company, under its protection and using the things which it furnished to him for his use during the employment and as incident to such employment. "The general rule under the authorities is that when the contract of employment contemplates that the employees shall sleep upon the premises of the employer, the employee, under such circumstances, is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer.

23. *Rose v. Morrison*, 4 B. W. C. C. 277, L. R. A. 1916A, 318; *Cook v. Manver's Main Collieries*, 7 B. W. C. C. 696; *Cogdon v. Sunderland Gas Co.*, 1 B. W. C. C. 156, L. R. A. 1916A, 318; *Elliot v. Rex*, (1904), 6 W. C. C. 27; *Thompson v. Flemington Coal Co.*, (1911), 48 Sc. L. Rep. 740, 4 B. W. C. C. 406.

24. *Vulcan Detinning Co. v. Indus. Comm.*, — Ill. —, (1920), 128 N. E. 917, 7 W. C. L. J. 191.

Rucker v. Read, 39 N. J. L. J. 48; Chitty v. Nelson, 2 B. W. C. C. 496; Aldridge v. Merry 6 B. W. C. C. 450; Griffith v. Cole Bros. et al., (Iowa), 165 N. W. 577; Meyers v. Michigan Cent. R. Co., (Mich.), 165 N. W. 703; Cokolon v. Ship Kentra, 5 B. W. C. C. 658; International & G. N. R. Co. v. Ryan, 82 Tex. 565, 18 S. W. 219.' The injury in this case arose out of and in the course of the employment.²⁵

An employee was injured when a hut on the premises of his employer blew down while he was in bed. The employer obtained permission from the government to erect houses on the premises to accommodate the workmen, and the advertisement for workmen stated that the hut and sleeping accommodation were to be rent free at 2 cents a day. The workmen were required to pay half the expense of keeping an attendant to care for the huts, but this was not to be considered as rent. On the evening of the accident applicant had been working overtime and went to the hut and to bed at 9 p. m. About 10 p. m. a storm blew the hut down upon the applicant, mortally injuring him. In reversing an award the court said: "Take the case of a domestic servant where there is a continuity in the course of employment. During the time when the domestic servant is having his meals on the employer's premises or sleeping on his employer's premises 'the course of his employment' continues, and it is not interrupted. But supposing the servant goes out for a few hours for his own purposes, 'the course of the employment' is thereby interrupted. The contract of service remains; he is still in his employer's service, but from the time he goes out for his own purposes until the time he returns to his work 'the course of the employment' is interrupted, and an accident to him would not be an accident 'in the course of the employment.' Those are the general principles which must be taken as settled. And, applying those to the present case, the workman is, in my opinion, in the same position for this purpose as if he was merely living in a house provided by his employer, like a laborer living in a cottage provided by his employer as

25. Holt Lbr. Co. v. Indus. Comm. of Wis., 168 Wis. 381, 170 N. W. 366, 3 W. C. L. J. 549, 18 N. C. C. A. 1027; In Re Thomas Arthur, 2nd A. R. U. S. C. C. 255; In Re John Medanich, 2nd A. R. U. S. C. C. 256.

part of the remuneration provided for his services. He was not living in the hut upon any term of contract for his employer's benefit that he should be there. The workman was given the choice, and was as free as possible to come or go.²⁶

An apartment house janitress received as compensation for her services five dollars monthly, the free use of her apartment, and gas for the same. One morning when about to sit down to her breakfast some plaster from the kitchen ceiling fell on the claimant, injuring her. In denying that the accident arose out of and in the course of the employment, the court said: "The case is no different than it would be if the claimant, although janitress of the building in question, had occupied an apartment in another building and the accident had there occurred. In no proper sense can it be said that she was janitress of her own apartment, merely because it happened to be a part of the building of which she was the janitress. In her own apartment she presided over her household affairs and was serving, not her employer, but herself and her family. If this award can be sustained, so also it should be sustained if the plaster had fallen on her at night while she was sleeping, or while doing any ordinary housework for the requirements or convenience of her family. At the time of the accident she was doing nothing for her employers, nor anything incidental thereto. Her duty to them did not require her presence in her apartment. What she was doing was personal to herself. It was entirely disassociated with the work of her employer."²⁷

A section foreman fell from a trestle on Sunday, a time when he was not regularly required to be about the railroad. His duties were not connected with the trestle, and it was not shown that he was there by the direction of his employer. It was held that the foreman did not lose his life in the course of his employment, and his dependents were not therefore entitled to compensation.²⁸

26. *Philbin v. Hayes*, 119 L. T. R. 133, 17 N. C. C. A. 947.

27. *Lauterbach v. Jarett et al.*, 189 App. Div. 303, 178 N. Y. Supp. 480, 5 W. C. L. J. 100. See also *Daly v. Bates & Roberts*, 224 N. Y. 120 N. E. 118.

28. *In Re Watkins*, Ohio I. C., (1914), 7 N. C. C. A. 434.

A housekeeper employed in defendant's hotel, resided at the hotel, her duties requiring her to be available at all hours, although her active duties did not begin until eight o'clock. At 7 o'clock she was injured as a result of stumbling over a pile of linen while going for hot water for toilet purposes. It was held that the accident arose out of and in the course of her employment.²⁹

A hotel employee went shopping after her day's work. Upon returning she fell on the way to her room and broke her arm. In addition to her wages she received board and lodging furnished by her employers. After working hours she was free to do and go as she pleased. It was held that the injury did not arise out of and in the course of her employment.³⁰

A workman, whose employment required him to occupy sleeping and living quarters furnished by the government, was injured after hours, but at quarters. It was held that he was injured in the course of his employment.³¹

An employee, furnished quarters on a boat, left the boat after working hours to visit a neighboring town, and was drowned when returning. It was held that his death did not occur in the course of his employment.³²

An employee sustained an injury causing his death, when he visited a building, which his employer had contracted to construct. His employment status was not in effect at the time, the employee having visited the building for purposes of his own, and not being engaged in the work of the employer at the time, it was held that the injury did not arise out of and in the course of the employment.³³

29. *Leonard v. Fremont Hotel*, 2 Cal. I. A. C. 924, (1915), 12 N. C. C. A. 667; *In Re John H. T. Flattery*, 3rd A. R. U. S. C. C. 168.

30. *Doherty v. Employer's Liab. Assur. Corp., Ltd.*, 1 Mass. W. C. C. 450, 12 N. C. C. A. 668; *Mahoney v. Sterling Borax Co.*, 2 Cal. I. A. C. D. 700, (1915), 12 N. C. C. A. 668.

31. *In re Claim of C. E. Holt*, Op. Sol. Dep. C. & L. (1915), 302; *In re Claim of Jenkins*, Op. Sol. Dep. C. & L. (1915), 334.

32. *In re Claim of Jackson*, Op. Sol. Dep. C. & L. (1915), 320; *In re Claim of Gilson*, Op. Sol. Dep. C. & L. (1915), 326; *In re Claim of Wm. P. Brown*, Op. Sol. Dep. C. & L. (1913), 328.

33. *Lynn v. Employers' Liab. Assur. Corp., Ltd.*, 2 Mass. W. C. C. 507, (1914), 13 N. C. C. A. 491.

A garage employee was injured, when he visited the garage, where he was employed, on a holiday, to obtain certain articles required by a contestant in automobile races. The employee had been given a car for his own pleasure on the holiday. It was held that the accident did not arise out of the employment.³⁴

§ 280. **Away From Place of Employment on Own Business or Business Other Than Employer's** —Where an employee attempted to work through two shifts in order that he might relieve the congested condition of labor, and left his place of work and proceeded to an adjoining building on the premises to sleep, and his immediate superior, in order to awaken him, threw a brick on top of the house where he was asleep, and the brick went through and killed the employee, the act of the superior added a risk of danger fairly within the contemplation of the employer, so that the servant's death resulted from an accident arising out of and in the course of the employment.³⁵

An engineer, during his vacation, received full pay and was subject to his employer's call. He went to inspect a pumping station, at the request of the superintendent of his employer, in order that its efficiency might be increased. He drove his own automobile, and while en route sustained injuries in an accident. In deciding that the accident arose "out of and in the course of the employment," the court said: "Did he go upon this mission voluntarily or because of the request of his superintendent? The referee finds that he went not only at the request of the superintendent, but in pursuance of the policy which the company followed with all its employees. He was therefore practically under orders and in the performance of his duty when he was injured."³⁶

An employee left the building in which he performed his duties and went to another building, where he fell down an elevator shaft. The board found that at the time of the accident claimant had no duties to perform at the building where the accident oc-

34. *Held v. Cuyler Lee*, 2 Cal. I. A. C. 719, 12 N. C. C. A. 905.

35. *Colucci v. Edison Portland Cement Co.*, 93 N. J. L. 332, (1919), 108 Atl. 313.

36. *Messer v. Mfr's Light & Heat Co., et al.*, 263 Penn. 5, 106 Atl. 85, 3 W. C. L. J. 791.

curred, but that he was there on his own initiative, and that therefore the accident did not arise out of and in the course of the employment.³⁷

Where a night watchman left his duties to visit the owner of a boat and when he attempted to return to his duties he jumped into the water, and died later from the effects of the exposure, it was held that the accident did not arise out of the employment.³⁸

Where a railroad employee responded to a fire call and assisted in fighting a forest fire, sustaining injuries while so doing, it was held that, despite the fact that there was a statute making it a misdemeanor to refuse when called upon to fight fires, the accident did not arise out of and in the course of the employment.³⁹

An employee was killed by falling down an elevator shaft. The duties of deceased required him to be on the ground floor and under no circumstances was he required to be elsewhere during his employment. In the absence of any direct evidence showing that the accident occurred while he was away from his regular place of employment in the performance of some duty connected with his employment, compensation must be denied.⁴⁰

Where a ship's employee went ashore to provide provisions for himself, and was drowned in an attempt to return to the boat, the court, holding that the accident which resulted in the death of decedent, did not arise out of the employment, said: "I cannot, * * * assent * * * to the * * * proposition which was made, to the effect that if a man goes on shore lawfully, for a purpose which must have been contemplated as one of the purposes for which he would go on shore, that makes him on shore upon the ship's business or pursuant to any duty owed to his employer."⁴¹

37. *Borck v. Simon J. Murphy Co.*, 205 Mich. 472, 171 N. W. 470, 18 N. C. C. A. 1042; *In Re Orville J. Pettijohn*, 2nd A. R. U. S. C. C. 244; *In Re W. J. Tyler*, 2nd A. R. U. S. C. C. 246.

38. *King v. State Ins. Fund*, 184 N. Y. App. Div. 453, 171 N. Y. Supp. 1032, 2 W. C. L. J. 921; *Weis Paper Mills Co. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 732, 6 W. C. L. J. 307.

39. *Kennelly v. Stearns Salt and Lbr. Co.*, 190 Mich. 628, 157 N. W. 378, 15 N. C. C. A. 218.

40. *Casualty Co. of America v. Indus. Acc. Comm.*, 176 Cal. 530, 169 Pac. 76, 1 W. C. L. J. 295, 15 N. C. C. A. 233.

41. *Parker v. Black Rock (owners of)*, (1915), W. C. & Ins. Rep. 369, 15 N. C. C. A. 259.

A teamster, who was engaged in hauling coal from a mine to customers, was killed while hauling coal to his own home on his own time. It was held that the accident resulting in decedent's death did not arise out of and in the course of the employment.⁴²

Deceased was permitted for purposes of his own to leave his boat, on which he was employed as chief engineer. When returning and while going along the quay, he missed his bridge leading to the ship, and fell off the pier and was drowned. In reversing an award of compensation the House of Lords said: "If the employee had reached the ship or ladders, by which the ship was to be boarded he might properly be taken to have been directed to use them as being part of the vessel on which he was living as an incident to his employment. But was the quay, by which he was actually approaching when the accident happened, a place where he was directed to be, or a place for which the employers had any responsibility at all? It seems to me that this question ought on broad principles to be answered in the negative. Surely a street in Ramsgate would not have been such a place in the absence of special circumstances. That is clear from principles which have been firmly laid down. In order to make it such a place it would be necessary to prove as a special fact that the engineer was directed to use it for some object in which he was employed. Here there was no direction. He was allowed leave for his own purposes. Was the quay, then, different in this respect from a street? It is said that it was, inasmuch as it was the natural way of proceeding towards the place where the ship was berthed. But a street might also have been part of such natural way."⁴³

Deceased was killed by an electric wire while carrying laundry from his home to a restaurant run by his wife for decedent's employer. It was contended that deceased was performing work for his employer and that his contract of employment contemplated that he would assist his wife about the restaurant in addition to

42. *Sugar Valley Coal Co. v. Drake*, 64 Ind. App. —, 117 N. E. 937, 1 W. C. L. J. 594.

43. *Charles R. Davidson & Co. v. M'Robb*, (1918), A. C. 304, 16 N. C. C. A. 912; *Spencer v. "Liberty" (owners)*, (1917), W. C. & Ins. Rep. 293, 16 N. C. C. A. 913.

caring for the building of his employer on the latter's premises. Upon conflicting testimony the court held that the accident occurred when deceased was performing an act not incidental to his employment and away from his regular place of employment, and therefore the accident did not arise out of and in the course of the employment.⁴⁴

Decedent was killed by an automobile while going to a point some distance from his place of employment to obtain tobacco. The court declared itself to be of the opinion that it could not be said that the employment had in any way subjected the decedent to the hazard to which he exposed himself in going for the tobacco.⁴⁵

Where an employee whose duties necessitated his being in the basement of the building and no other place about the building, left the basement and was injured when going to floors above in an elevator, the court held that the deceased, at the time of his injury, being away from his work and performing a voluntary act for his own pleasure or satisfaction, was engaged in an act outside the scope of his employment, that the injuries causing his death did not arise out of and in the course of his employment.⁴⁶

Where a girl was injured when her skirt entangled in a pulley while she was going from her place of work to another place in the same room to seek information pertaining to her work, from an older girl, it was held, that this being the custom in this place therefore the accident arose out of and in the course of the employment.⁴⁷

Where an employee was injured in the course of his employment, necessitating bandages, and was severely burned at home as a result of the bandages catching on fire, it was held that the

44. *Murphy v. Ludlum Steel Co.*, 182 App. Div. 139, 169 N. Y. Supp. 781, 16 N. C. C. A. 901, 1 W. C. L. J. 1122.

45. *In re Betts*, 64 Ind. App. —, 118 N. E. 551, 16 N. C. C. A. 904, 1 W. C. L. J. 569.

46. *Spooner v. Detroit Saturday Night Co.*, 187 Mich. 125, 153 N. W. 657, 9 N. C. C. A. 647.

47. *Vreeland v. Cogswell & Boulter Co.*, 37 N. J. L. J. 57; *Broadway Coal Mining Co. v. Robinson*, 150 S. W. 1000, 150 Ky. 707.

burn was not caused by an accident arising out of and in the course of the employment.⁴⁸

A railroad conductor who was injured on a run made for the sole pleasure of the employees, but with the employer's permission, was not injured in the course of his employment.⁴⁹

An employee reported for work, and before starting to work he left the premises to mail a letter at the direction of a fellow workman, and while away he met with an accident which necessitated the amputation of his foot. The person who ordered him to mail the letter was not a foreman. It was held that he was not injured in the course of the employment.⁵⁰

A master's duty to furnish his servants a safe place for work extends to such parts of his premises only as he had prepared for their occupancy while doing his work, and to such other parts as he knows, or ought to know, they are accustomed to use while doing, it, and when a servant goes to some other part for his own convenience, the general rule is that he is regarded as a licensee merely.⁵¹

A waitress entitled to ride in her employer's bus while on personal errands, was injured while riding therein on her way back to work, due to the negligence of the chauffeur. The court held

48. *Re Claim of Rockwell*, Op. Sol., Dep. C. & L. (1915), 242.

49. *In re Claim of Fitzpatrick*, Op. Sol., Dep. C. & L. (1915), 306.

50. *In re Deavers*, Ohio Ind. Comm. (1914), 7 N. C. C. A. 419.

51. *Connell v. New York Central & H. R. R. Co.*, 144 App. Div. 664, 129 Supp. 666; *Pioneer Mining & Mfg. Co. v. Talley*, 43 So. 800, 152 Ala. 162; *Sutton v. Wabash R. Co.*, 152 Ill. App. 138; *Lynch v. Texas & P. Ry. Co.*, 133 S. W. 522, Tex. Civ. App. —; *O'Brien v. Western Steel Co.*, 13 S. W. 402, 100 Mo. 182; *Mitchell-Tranter Co. v. Ehmett*, 65 S. W. 805, 23 Ky. Law Rep. 1788, 55 L. R. A. 710; *Kennedy v. Chase*, 52 Pac. 33, 119 Cal. 637; *Brown v. Shirley Hill Coal Co.*, 94 N. E. 574, 47 Ind. App. 354; *Ellsworth v. Metheny*, 104 Fed. 119, 51 L. R. A. 389; *Southern Railway Co. v. Bentley*, 56 So. 249, 1 Ala. App. 359; *Russell v. Oregon Short Line R. Co.*, 155 Fed. 22; *Pittsburg Vitrified Pav. & Build. Brick Co. v. Fisher*, 100 Pac. 507, 79 Kans. 576; *Northern Coal & Coke Co. v. Allera*, 104 Pac. 197, 46 Colo. 224; *Gooch v. Citizens Electric St. Ry. Co.*, 88 N. E. 591, 202 Mass. 254, 23 L. R. A. (N. S.) 960n.; *Clapp's Parking Station v. Indus. Acc. Comm.*, — Cal. —, (1921), 197 Pacific 369.

that such injury did not arise in her employment, so as to make her and the chauffeur fellow servants, thereby requiring her to proceed under the Workmen's Compensation Act.⁵²

Where a salesmanager on vacation on a ranch was injured while returning from a post office, where he had gone to answer a military questionnaire, and while there also wrote and mailed a reply to a business letter from his employer, received at the ranch, it was held that his injury was not the result of an accident arising out of his employment.⁵³

Where an employee was injured while answering a call as a city fireman, it cannot be said that his injuries arose out of his employment, since the employer is not an insurer against all injuries.⁵⁴

Where a farm employee was given permission to go to a cobbler to get a heavy pair of shoes before going to the woods as directed, and on the way stopped at a saloon, and then started for a post office and was killed by an automobile, it was held that his death was not due to an accident arising out and in the course of his employment, as he was outside of the course of his employment at the time of the accident.⁵⁵

An employee on vacation under full pay and required to furnish a substitute is not entitled to compensation under the Federal Act for injuries received while on vacation.⁵⁶

§ 281. Accidents to Employees Under Contract But Before Beginning Work, Before Actual Hiring and After Discharge.—

An extra switchman reported for work and was informed that there would be no work for that day. He climbed on a moving freight train for his own convenience in going home, and was

52. *Roth v. Adirondack Co.*, 183 N. Y. S. 717, 6 W. C. L. J. 557; *In re Warren W. Loney*, 3rd A. R. U. S. C. C. 168.

53. *Continental Casualty Co. v. Indus. Comm.*, — Cal. App. —, (1920), 190 Pac. 849, 6 W. C. L. J. 434; *Hutno v. Lehigh Coal and Navigation Co.*, — Pa. —, (1921), 113 Atl. 68.

54. *White v. Eastern Mfg. Co.*, — Me. —, (1921), 112 Atl. 841.

55. *Gisner v. Dunlop*, 181 N. Y. S. 789, — App. Div. —, (1920), 6 W. C. L. J. 80.

56. *In re Wm. E. Machamer*, 2nd A. R. U. S. C. 233.

struck by a viaduct and killed. The court held that the accident did not arise out of the employment, his employment having ceased, and his act had no connection with his employment by the railroad. The employment was from day to day, and in coming to the place in the morning he was seeking to establish the relation of employer and employee, and even if we assume that the relation did exist, it was terminated as soon as he was informed that there was no work that day.⁵²

An employee was laid off because of ill health and told to wait until he was able to work, and he returned the next day and began work. Later he was found dead at the place where his duties necessitated his presence. The court held that the employee was not absolutely discharged, and his going to work according to the directions found on a slip in his locker, as was customary, established the relation of employer and employee. Therefore the accident arose out of the employment.⁵³

An engineer reported for duty in a state of intoxication, and the evidence tended to show that he had been laid off for the night by the foreman, and later he went on duty and was killed while spotting furnaces. The lower court held that the contract of employment had ceased and reversed an award of compensation. The appellate court reversed the court of common pleas on the ground that the issue of the alleged discharge had been found against the employer.⁵⁴

A laborer, who seeking employment, visited defendant's office and was directed to go to defendant's logging camp, on a logging train, and was injured on the way. It was held that he was not an employee at the time of the accident.⁵⁵

A laborer applied for employment in the evening and was informed that there was no work, but was given, at his request,

57. *Michigan Central R. Co. v. Industrial Comm.*, 290 Ill. 503, 125 N. E. 278, 5 W. C. L. J. 189.

58. *Chicago Cleaning Co. v. Indus. Bd. of Ill.*, 283 Ill. 177, 118 N. E. 989, 16 N. C. C. A. 928.

59. *Dainty v. Jones & Laughlin Steel Co.*, 263 Pa. 109, 106 Atl. 194, (1919), 18 N. C. C. A. 1036; *Harvey v. Gironda*, Ill. Ind. Bd., (1915), 13 N. C. C. A. 496.

60. *Susznik v. Alger Logging Co.*, 76 Oregon 189, 147 Pac. 922.

lodging and a meal slip entitling him to supper and breakfast, and was told to report in the morning to see if there was any chance for employment. He did not report according to instructions but slept until noon. While going for dinner he was struck by a train and injured. In reversing an award the appellate court held that he was not in the employment of defendant at the time of the injury, and therefore the accident could not have arisen out of the employment.⁶¹

Where a seaman was drowned after being discharged for intoxication, the court held that he was under the protection of the act for a sufficient length of time to enable him to leave the boat. But in the absence of any evidence to establish that was drowned while leaving, it could not base an award upon mere conjecture. If the drowning occurred after deceased had reached the pier he was no longer in the employment of the master, and not entitled to the protection of the act.⁶²

An extra gang trackman was employed by a railroad company to begin work a day or two afterwards. As part of his compensation he received transportation to the place of his employment and was to receive sleeping accommodations upon arrival, pending the beginning of employment. After arriving at his destination and while waiting to get into a bunk car, he was struck by a car of the company and killed. "It is clear that the deceased, when injured, was not in the employ of the railroad company. He had been hired to go to work at a time in the future. In the meantime he was provided with a place to stay in the bunk house and had been furnished transportation to that place from Decatur. He had no duties to perform, he had performed none and was not expected to perform any until Saturday or Monday. What he had received in the way of transportation and expected to receive in having a place to stay until his employment began was a part of his compensation, but the fact that he had received

61. *Brassard v. Delaware & H. Co.*, 186 App. Div. 647, 175 N. Y. S. 359, (1919), 18 N. C. C. A. 1037; *In re Tucker*, I. C. 1914, 13 N. C. C. A. 491.

62. *In re Whalen*, 186 N. Y. App. Div. 190, 173 N. Y. S. 856, (1919), 18 N. C. C. A. 1037.

this compensation was no evidence that he was in the employ of the railroad company, in view of the terms of the contract that he was not to go to work until some time in the future.^{'63}

The claimant had been in the employ of the appellant for about 8 months. Upon appearing for work a little late one morning the superintendent told him he need not work. He excused him not for being late but because he felt that he had been drinking and was unfit for work. He started to leave the subway and tripped and fell, sustaining injuries. "The appeal proceeds upon the theory that he was not a regular employee, but was there asking for work, which was refused, and that he was not, therefore, injured within the course of his employment. This contention overlooks the fact that he had been employed almost continuously for 8 months and that there was not a separate employment from day to day. The only thing tending to show a daily employment is that he was paid by the day, but his wages were payable weekly. Concededly, he was expected to report for work that morning, and did report, and was told that he was not wanted. He was, therefore, a regular employee, and was there in the performance of his duty as such, and is entitled to the benefit of the act. The award should be affirmed."^{'64}

A carpenter started to work on a church in the course of construction without being hired by the person in charge, but in the hope that he would be employed. He was injured before any ratification of his conditional permission to work and before any actual hiring. It was held that he was not entitled to the protection of the act.⁶⁵

An employee was injured while preparing his personal tools, which he intended to use in work which was to begin in the future. He was under a contract of employment at the time of the injury, but his term of employment was not to begin until a fu-

63. *Bloomington, Decatur & Champaign R. Co. v. Indus. Bd.*, 276 Ill. 239, 114 N. E. 517, 13 N. C. C. A. 490.

64. *Kiernan v. Priestedt Underpinning Co.*, 171 N. Y. App. Div. 539, 157 N. Y. Supp. 900, 13 N. C. C. A. 497.

65. *Steiman v. Sofard*, 2 Cal. Ind. Acc. Com. 944 (1915).

ture date, therefore the accident did not arise in the course of the employment.⁶⁶

Where an employee is injured while seeking employment, or after discharge, providing a reasonable time is allowed for him to leave the premises, and while under contract of employment but before commencement of work, the general rule is that the accident does not arise out of and in the course of the employment.⁶⁷

§ 282. **The Employee's or Another's Wilful Misconduct.**—In **General.**—Some acts provide that compensation shall not be paid when the disabling injury is due to the employee's serious and wilful misconduct.⁶⁸

The decisions on these provisions will throw light on the interpretation of the term "wilful misconduct" where that term is used alone, as is true of most of the acts. In fact the two terms have been considered by some of the courts to have the same meaning.⁶⁹

It has been held that the word "wilful" imports that the conduct was deliberate and not merely a thoughtless act on the spur of the moment or an act showing a lack of judgment;⁷⁰ that it is the intentional doing of something either with the knowledge that

66. In re Luenil, Ohio Ind. Com., (1915), 13 N. C. C. A. 491.

67. Dickerson v. Bornstein, 173 S. W. 773, 144, Ky. 19; Greenburg v. Atwood, 38 N. J. L. J. 54, 13 N. C. C. A. 495; Ganley v. Employer's Liab. Assur. Corp., Ltd., 2 Mass. Workn. C. C. 159, (1913), 13 N. C. C. A. 1916A (note) 243; Farmer's Grain and Supply Co. of Minden v. N. C. C. A. 492; Hutcheson v. Frankfort General Ins. Co., Mass. W. C. C., (1915), 13 N. C. C. A. 493; Moork v. Howard, 1 Cal. I. A. C. D. 475, (1914), 13 N. C. C. A. 493; Spencer v. Dowd, 1 Cal. I. A. C. 46, (1914), 13 N. C. C. A. 494; Booth v. Burnett, 2 Cal. I. A. C. 162, (1915), 13 N. C. C. A. 495; In re Boyle, Ohio Ind. Comm., (1915), 13 N. C. C. A. 496; In re Gilbert, 14 Ohio L. Rep. 164, (1916), 13 N. C. C. A. 497; In re Burshe, Ohio I. C. 1915, 13 N. C. C. A. 498; Merritt v. North Pac. S. S. Co., 2 Cal. I. A. C. 273, 12 N. C. C. A. 82; Rogers v. Rogers. — Ind. App. —, 122 N. E. 778, 4 W. C. L. J. 58.

68. In re Murphy, 224 Mass. 592, 113 N. E. 283.

69. Diestelhorst v. Ind. Acc. Comm., 32 Cal. App. 771, 164 Pac. 44.

70. Johnson v. Marshall Sons & Co., (1906), 94 L. T. 828, 8 W. C. C. 10, 5 Ann. Cas. 630; Belknap v. Mervy-Elwell Co., 1 Cal. Ind. Acc. Com.

it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences;⁷¹ that the deliberate, wilful, premeditated violation of a rule made for the protection of the employee himself against the consequences of an accident is wilful misconduct.⁷²

The seriousness contemplated by the statute must attach to the act in the doing of it, and not merely to the consequences thereof as they actually develop. So, where a brakeman stood on the platform of a car in such a position that he would inevitably be killed when the train entered a tunnel, the court held that "any neglect is a serious neglect within the meaning of the act, which, in the view of reasonable persons, * * * expose anybody, (including the person guilty of it) to the risks of serious injury. * * * The test is the apprehended, as distinguished from the actual consequences."⁷³

And where a workman was injured while walking along a tramway in a mine, upon which he knew trains were approaching, where the injury was caused by the rope slipping, and there was no evidence that he could not have reached a manhole before the train reached him, it was held that he was not guilty of serious and wilful misconduct.⁷⁴

Mere disobedience of orders does not necessarily, as a matter of law, constitute serious and wilful misconduct, nor does the phrase include every violation of rules.⁷⁵

(Part 1) 82; *Wallace v. Glenboig Union Fire Clay Co.*, (1907), S. C. (Scot) 967; *Kent v. Boyne City Chemical Co.*, 162 N. W. 268, A 1 W. C. L. J. 952.

71. *Beckles' Case*, 230 Mass. 272, 119 N. E. 653, 2 W. C. L. J. 278; *Bersch v. Morris & Co.*, Kan. City, 189 Pac. 934, 6 W. C. L. J. 156.

72. *Smith v. Munger Laundry Co.*, 1 Cal. Ind. Acc. Comm. (Part II) 168; *United States Fidelity, etc. Co. v. Ind. Acc. Comm.*, 174 Cal. 616, 163 Pac. 1013.

73. *Hill v. Granby Consol. Mines*, (1906), 12 B. C. 118.

74. *Rees v. Powell Duffryn Steam Coal Co.*, (1900), 64 J. P. (Eng.) 164, 4 W. C. C. 17; *Glasgow & S. W. R. Co. v. Laidlaw*, (1900), 2 Sc. Sess. Cas. 5th series 703, 37 Scot L. T. 503, 7 Scot Law Times 420.

75. *Peru Basket Co. v. Kuntz*, (1919), (Ind. App.), 122 N. E. 349; *Great Western Power Co. v. Pillsbury*, (1915), 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 466; *Freeman v. East Jordon & S. R. Co.*, 191 Mich. 529,

Where a rule has not been rigidly enforced the question of wilful misconduct is eliminated from the case.⁷⁵

It has been stated by the California commission that: "It is perhaps impossible so to define 'wilful misconduct' as to make such definition applicable to all cases, but it may be stated in a general way to consist in the 'wilful violation' of a rule or order made for the employee's own safety, or for the safety of others, such rule being prescribed by a power having authority to make such rules, and enforce with diligence."⁷⁷ In a Massachusetts case the court said: "Serious and wilful misconduct is much more than mere negligence or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something either with knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences."⁷⁸ It has been held that voluntary suicide is serious and wilful misconduct;⁷⁹ that wilfulness is the essential element which must be established.⁸⁰

Under the English act of 1906, serious and wilful misconduct is not a bar to compensation where the injury results in death, or in serious and permanent disablement. Although a collier, in disobedience to special rules of the plant, and against warnings of a fireman, went into dangerous workings of the mine and was guilty

158 N. W. 204; *George v. Glasgow Coal Co.*, (1909), A. C. (Eng.) 123, 2 B. W. C. C. 125; *Gray v. Indus. Acc. Comm.*, 34 Cal. App. 713, 168 Pac. 702.

76. *Rayner v. Sligh Furniture Co.*, 180 Mich. 168, L. R. A. 1916A, 22, 146 N. W. 665, Ann. Cas. 1916A, 386, 4 N. C. C. A. 851.

77. *Lutz v. Gladding, McBean & Co.*, 1 Cal. Ind. Acc. Com. (Part II) 8.

78. *In re Burns*, 218 Mass. 8, 105 N. E. 601, 5 N. C. C. A. 635, Ann. Cas. 1916A, 787; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 466; *Maryland Casualty Co. v. Ind. Acc. Comm.* 39 Cal. App. 229, 178 Pac. 542; *Nickerson's case*, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790, 5 N. C. C. A. 645; *Praties v. Broxburn Oil Co.*, (1906-07), Scot. S. C. 581; *Haskell & B. Car. Co. v. Kay*, (Ind. App.), 119 N. E. 811; *Indianapolis Light and Heat Co. v. Fitzwater* (Ind. App.), 121 N. E. 126.

79. *In re Von Ette*, 223 Mass. 56, 111 N. E. 696.

80. *Kraljivich v. Yellow Aster Mining & Milling Co.*, 1 Cal. Ind. Acc. Com. (Part II) 554.

of wilful misconduct, yet if he did so in an honest attempt to further that which he was instructed to effect, his death which resulted from such act arose out of the employment, and his conduct will not preclude a recovery.⁸¹

The Nebraska Act defines willful negligence as (1) a deliberate act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication at the time of the injury, such intoxication being without the consent, knowledge, or acquiescence of the employer or the employer's agent. The court construed this to mean more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree; a willingness to take a chance. Running along beside a rapidly moving train and suddenly falling against it by reason of slipping or becoming dizzy, does not show such wilful negligence as to deprive the deceased's dependents of compensation.⁸⁴

§ 283. **Acts Not Constituting Willful Misconduct.**—Where an employee undertook to cross a standing train without looking to see whether it was about to start, the court said: "While it is quite clear that the claimant's injury was brought about by his own gross negligence we are of the opinion that it cannot be said, as a matter of law, that he was guilty of such intentional and willful misconduct as would defeat his recovery."⁸⁵

Where an employee was engaged to do whitewashing, but was told not to work around the machinery until the noon hour, when it was stopped; but he started to work there just shortly before it stopped and was injured, the court said: "His decision to do some whitewashing during this very interval seems more like a

81. *Harding v. Brynddu Colliery Co.*, (1911), 2 K. B. 747, 80 L. J. K. B. N. S. 1052, 105 L. T. N. S. 55, 27 Times L. R. 500, 55 Sol. Jo. 599, 4 B. W. C. C. 269; *Jackson v. Denton Colliery Co.*, (1914), W. C. & Ins. Rep. 91, 110 L. T. N. 559, 7 B. W. C. C. 92.

84. *Farmers Grain and Supply Co. of Minden v. Blanchard*, — Neb. —, (1920), 178 N. W. 257, 6 W. C. L. J. 362.

85. *Gignac v. Studebaker Corp.*, 186 Mich. 576, 152 N. W. 1037, L. R. A. 1916A (note) 243; *Farmer's Grain and Supply Co. of Minden v. Blanchard*, — Neb. —, (1920), 178 N. W. 257, 6 W. C. L. J. 362.

sudden thought, than a willful act. * * * The fact that the injury was occasioned by the employee's disobedience to an order is not decisive against him. To have that effect, the disobedience must have been willful * * * deliberate, not merely a thoughtless act on the spur of the moment."⁸⁵

It has been held that willful negligence on the part of the workman constitutes no defense to a compensation claim under some Compensation Acts;⁸⁷ that misconduct of itself is not sufficient to bar a claim, willfulness being the essential element, must be established;⁸⁸ that where a miner, after doing some "holing," by neglecting to put in the supports, left a mass of shale overhanging in a dangerous position, which was in violation of a statutory regulation, and later was killed by the shale falling upon him, the accident could not be attributed to serious misconduct;⁸⁹ that an employee, who, impulsively and without reflection, attempts to clear sand off a moving belt, without stopping it, is not guilty of willful misconduct;⁹⁰ that serious and willful misconduct is much more than mere negligence;⁹¹ that the mere doing of a thing in a careless manner, or in a wrong way, without intention to violate a necessary rule of safety, or to do injury, is not "willful misconduct."⁹²

86. *In re Nickerson*, 218 Mass. 158, 105 N. E. 604, 5 N. C. C. A. 645; *Bersch v. Morris & Co.*, — Kan. —, (1920), 189 Pac. 934, 6 W. C. L. J. 156; *In re Ivan H. Peters*, 2nd A. R. U. S. C. C. 281.

87. *West Jersey Trust Co. v. Philadelphia & R. Ry. Co.*, 88 N. J. Law, 102, 95 Atl. 753; *Taylor v. Seabrook*, 87 N. J. Law, 407, 94 Atl. 399, 11 N. C. C. A. 710; *In re Wilbur M. Peyton*, 2nd A. R. U. S. C. C. 280.

88. *Kraljivich v. Yellow Aster Mining & Milling Co.*, 1 I. A. C. Dec. 554.

89. *Tennant v. Broxburn Oil Co., Ltd.*, (1907), S. C. 581, Ct. of Sess; *In re Lee A. Edward*, 2nd A. R. U. S. C. C. 286.

90. *Swank v. Chanslor-Canfield Midway Oil Co.*, 2 Cal. I. A. C. Dec. 330.

91. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; 9 N. C. C. A. 466; *Archibald v. Ott.*, 77 W. Va. 448 87 S. E. 790; *McNicholas v. Dawson*, 1 W. C. C. 86.

92. *Nevadje v. N. W. Iron Co.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366 Ann. Cas. 1915B, 877; *Hedges v. City of Los Angeles*, 1 Cal. I. A. C. Dec. 394; *Coelho v. Rideout Co.*, 2 Cal. I. A. C. Dec. 773; *Rockford Cabinet Co. v. Indus. Comm.* — Ill. —, (1920), 129 N. E. 143, 7 W. C. L. J. 280.

It is not willful misconduct: Where a night watchman in the employ of a construction company, knowing that escaping robbers were in the vicinity, through a mistake fired on deputy sheriffs who returned the fire and injured him.⁹³ Where a delivery boy, riding a bicycle, caught on the rear end of a motor truck, which turned suddenly, causing him to be thrown to the pavement and injured him.⁹⁴ Where an employee removed a sliver from his finger with a pocket knife, after warning of danger of infection, even though infection developed in the finger, unless it could be shown that the knife was the means of introducing the infection.⁹⁵ Where the deceased was violating a city ordinance he was merely guilty of negligence.⁹⁶ Where the usual means for washing up failed one evening, and the servant went to another department to heat water, where he was injured.⁹⁷ Where the employee lost his eye partly by reason of the fact that he did not care for it properly after the accident.⁹⁸ Where a female teacher shoved aside a 458-pound desk to get a necessary book from a case, and injured her spine.⁹⁹ Where a minor had been instructed not to oil certain machinery while in motion, but did so thoughtlessly after the power had been shut off and the machine was moving of its own momentum.¹ Where a deck hand was last seen leaning against a post near the edge of a barge apparently asleep and was drowned by falling off.² Where a miner, while temporarily waiting for another assignment,

93. *In re Harbroe*, 223 Mass. 139, 111 N. E. 709.

94. *Beaudry v. Watkins*, 191 Mich. 445, 158 N. W. 16, L. R. A. 1916F, 576, 15 W. C. C. A. 152.

95. *Blain v. McKinsey*, 1 Cal. I. A. C. Dec. 641.

96. *Alexander v. Ind. Bd.*, 281 Ill. 201, 117 N. E. 1040, 1 W. C. L. J. 313, 15 N. C. C. A. 167.

97. *In re Ayers*, 64 Ind. App. —, 118 N. E. 386, 1 W. C. L. J. 559, 17 N. C. C. A. 378.

98. *Riley v. Mason Motor Co.*, 199 Mich. 233, 165 N. W. 745, 1 W. C. L. J. 406.

99. *Elk Grove Union High School Dist. v. Ind. Acc. Com.*, 34 Cal. App. 589, 168 Pac. 392, 1 W. C. L. J. 143, 15 N. C. C. A. 148.

1. *Diestelhorst v. Ind. Acc. Com.*, 32 Cal. App. 771, 164 Pac. 44, 15 N. C. C. A. 149, 161.

2. *Rideout v. Pillsbury*, 173 Cal. 132, 159 Pac. 435, 12 N. C. C. A. 1032

rested in the shade of an ore bin, which collapsed and killed him.³ Where an inexperienced employee entered a wine vat to clean it, and failed to test it for suffocating atmosphere.⁴ Where a workman stood on a machine when the hoods were being removed, when he might have stood on the ground.⁵ Where an injured workman stated in response to a question of his physician that he was not an alcoholic, when he was addicted somewhat to its use, he not understanding that his answer would affect the treatment given.⁶ Driving an automobile at a speed of 35 to 45 miles, in the dark, over a fairly good and straight road, by a driver familiar with it, in a heavy, powerful car, equipped with strong lights, may be hazardous, but does not exceed gross negligence.⁷

An employee, who violated a rule, which required that no employee should work over an overhanging bank without first requiring it to be caved off, was not guilty of such misconduct as to place him without the scope of his employment, but was guilty of misconduct of such a nature as would entitle the employer to have the compensation of such employee reduced 50 per cent as provided under the Colorado act for the violation of a reasonable rule.⁸

An employee was killed by an electric shock, while drawing gasoline for use in cleaning floors. In using gasoline the employee violated an order against the using of gasoline for this purpose, but the violation was known to the employer. In holding that the accident arose out of and in the course of employment, the court said: "That an employee, who, in an honest attempt to discharge a duty assigned him, does an act incidental thereto not specifically directed, or departs from the usual methods of performing his

3. Brooklyn Min. Co. v. State Ind. Acc. Comm., 172 Cal. 774, 159 Pac. 162, 15 N. C. C. A. 151.

4. United States Fidelity etc. Co. v. Ind. Acc. Comm., 174 Cal. 616, 163 Pac. 1013, 14 N. C. C. A. 429.

5. Messick v. McEntire, 97 Kan. 813, 156 Pac. 740, 15 N. C. C. A. 160.

6. Ramlow v. Moon Lake Ice Co., 192 Mich. 505, 158 N. W. 1027.

7. Head v. Head Drilling Co., 2 Cal. I. A. C. Dec. 279.

8. Indus. Comm. v. Funk, — Colo. —, (1920), 191 Pac. 125, 6 W. C. L. J. 436.

work, does not thereby necessarily deprive himself or his dependents, of a right to compensation, if injured while so engaged," that, "an employee may be said to receive an injury by accident arising in the course of his employment within the meaning of the Workmen's Compensation Act of this state when it occurs within the period of the employment, at a place where the employee may reasonably be, and while he is doing something reasonably connected with the discharge of the duties of his employment."⁹

A twenty year old employee working at a press was not, as a matter of law, guilty of willful misconduct within the workmen's compensation act, in catching at certain falling or loose cards, so that his hand was caught, though he had been warned against the danger of so doing. The court, in holding that the employee was not guilty of willful misconduct, said: "The doctrine that an unpremeditated and implusive act in violation of orders may not be willful misconduct finds some support in the authorities but usually non-age is an element of the decision in which such doctrine has been upheld. It seems to us, however, that the age of the person injured does not necessarily make a material difference. The tendency to recover something falling from a machine; to reach for a hat blown off the head by a sudden gust of wind; to apply the brakes to a 'skidding' automobile—in short to perform acts of many sorts upon the impulse of the moment, is not the failing of youth alone. The true tests to be applied have reference to the nature of the work being performed and the circumstances of each particular case. This court has been at pains more than once to define 'willful misconduct.' Perhaps the best definition (and, incidentally, the one cited by both parties to this controversy) is the one found in the opinion in *Great Western Power v. Industrial Accident Commission*, 170 Cal. 180, at page 189, 149 Pac. 35, 40. The court used this language: 'willful misconduct means something more than negligence. It does not include every violation or disregard of a rule. *Casey v. Humphries*, (1913), 6 B. W. C. C. 520. But it cannot be doubted that a workman who violates a

9. *Nordyke & Marmon Co. v. Swift*, — Ind. App. —, 123 N. E. 449, (1919), 18 N. C. C. A., 1021, 4 W. C. L. J. 179; *Southern Pac. Co. v. Indus. Acc. Comm.*, 177 Cal. 378, 170 Pac. 822, 1 W. C. L. J. 740.

reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct. *Brooker v. Warner*, 23 L. T. R. 201.'''¹⁰

A young man, 18 years old, was injured when his hand was caught while he was wiping off grease that was running down the framework of the drill press at which he was at work. There was a warning sign hanging there forbidding just such action as this while the machine was running. "The vertical shaft at the time of the injury was revolving slowly, and it was easier to wipe it while in motion than when still. While applicant was wiping it he saw a stream of grease running down the framework of the machine from the upper shaft, and, without thinking about the consequences likely to flow from his act, made a dive with his cloth at this stream of grease. The gearing caught the cloth and drew his hand into it, resulting in the loss of two fingers. It is clear that the sign warning against wiping the machine while in motion was intended to cover just such unforeseen and unlikely injuries as this. It follows, therefore, that if the warning sign, 'Stop this Machine before Repairing, Oiling, Adjusting or Wiping' constituted a safety order and regulation prescribed by the employer, the wiping of the machine by the employee, with full knowledge of the existence of the order, and of the consequences likely to result from its violation, constituted willful misconduct. There is no question that applicant knew of the existence of this warning sign, but it is in evidence that he did not know of the consequences likely to result from disobeying it. The reaching for the stream of oil going down the frame of the machine was in obedience to an impulse, thoughtless of danger. He knew better than to try to wipe the gearings while the machine was in motion, and had never done so. Neither the employer's superintendent nor the young man in whose custody applicant was placed had ex-

10. *Hyman Bros. Box & Label Co. v. Industrial Acc. Comm.* — Cal. —, (1919), 181 Pac. Rep. 784, 4 W. C. L. J. 343; *North Pac. Steamship Co. v. Indus. Acc. Comm. of Cal.* 174 Cal. 500, 163 Pac. 910, 15 N. C. C. A. 153. A 1 W. C. L. J. 170.

plained to him the risk attendant upon such wiping. Therefore one of the factors of willfulness as laid down by our Supreme Court in the Mayfield Case (*Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35, 1 I. A. C. 669), to wit, 'Knowledge of the consequences likely to result from disobedience,' was wanting."¹¹

Where blasted stumps constituted the cheapest fuel to be secured, and it was customary to obtain fuel in such manner, and a mine watchman, who was required to obtain his own fuel, had not been instructed not to use explosives, was killed while blasting stumps for fuel, he was not guilty of such recklessness as to amount to willful misconduct. The employee's duties as a watchman necessitated his presence, at all times, on the premises. The place of his employment was 10,500 feet above sea level. Therefore "to protect himself from undue and unnecessary exposure to the cold was a duty he owed his master as well as himself." Procuring fuel was, under the existing circumstances "arising out of and in the course of the employment." Assuming that he was guilty of negligence in using explosives instead of employing other means, still he would not be barred from the protection of the act, for "a peril which arises from the negligent or reckless manner in which he does the work which he is employed to do may well, and in most cases rightly, be held to be a risk incidental to the employment." There was no specific instructions against using explosives, therefore the employee was not guilty of willful misconduct. The injury arose out of and in the course of the employment.¹²

Deceased was killed while investigating an elevator rope, which did not work right. The evidence tended to establish that it was part of his duty to frequently run the elevator, but did not show that the condition of the elevator was such as to require the services of an electrician or a report to "elevator people." The

11. *Western Pac. R. Co. v. Indus. Acc. Com. of Cal.*, — Cal. —, (1919), 181 Pac. 787, 4 W. C. L. J. 348.

12. *Ocean Accident & Guaranty Corporation Ltd. v. Pallaro*, (1919), — Colo. —, 180 Pac. 95, 4 W. C. L. J. 15, 18 N. C. C. A. 1026; *Shafter Estate Co. v. Indus. Acc. Comm. of Cal.*, 175 Cal. 522, 166 Pac. 24, 15 N. C. C. A. 150; *Messick v. McEntire*, 97 Kas. 813, 156 Pac. 740, 15 N. C. C. A. 160.

court held that the contention of appellant, that, "deceased was guilty of willful misconduct" was not tenable, for it was the duty the employer to investigate, when the elevator ceased to operate, and determine the extent of the trouble.¹³

Claimant was not guilty of willful misconduct in refusing to undergo an operation to amputate his finger, where his attending physician advised that the finger could be saved.¹⁴

A janitor was killed by an electric shock when he entered a room, which he had been forbidden and warned against entering. The board found that the accident arose out of and in the course of employment, but did not pass upon the question of willful misconduct, not believing it to be in issue, because the defendant employer failed to plead it as a defense, as provided by the legislative act. The appellate court held that the board was right in not deciding this issue, as it was waived by a failure to plead it.¹⁵

Where an employee was killed, while driving a car with which he was unfamiliar, when he collided with a street car, it was held that the action of deceased was negligent, but did not amount to willful misconduct.¹⁶

Where certain safety appliances for use in drilling steel were furnished, which appliances were sufficient to afford adequate protection, and the employee chose a less effective appliance and was injured as a result thereof, it was held that the evidence supported a finding that the choice of appliances rested in the discretion of the employee and that, while it was negligent to choose the poorer appliance, still it could not be said that such action amounted to willful misconduct.¹⁷

13. *Rowe v. Leonard Warehouses, Inc.*, (1919), 206 Mich. 493, 173 N. W. Rep. 187, 4 W. C. L. J. 393.

14. *Enterprise Fence & Foundry Co. v. Majors*, — Ind. App. —, 121 N. W. 6, 3 W. C. L. J. 113.

15. *Northern Indiana Gas & Electric Co. v. Pietzvak*, — Ind. App. —, 1 W. C. L. J. 590, 118 N. E. 132, 15 N. C. C. A. 168.

16. *Maryland Casualty Co. v. Indus. Acc. Comm.*, 39 Cal. App. 229, 178 Pac. 542, 3 W. C. L. J. 577; *Merlino* Conn. Quarries Co., 93 Conn. 57, 104 Atl. 396, 2 W. C. L. J. 781; *Baltimore Car Foundry Co. v. Ruzicka*, 132 Md. 491, 104 Atl. 167, 2 W. C. L. J. 791, 17 N. C. C. A. 379, 4 Am. L. R. 113.

17. *Haskell & Barker Car Co. v. Kay*, — Ind. App. —, 119 N. E. 811, 2 W. C. L. J. 466, 17 N. C. C. A. 385.

Claimant froze both his hands while unloading coal and informed his employer the next morning. He was advised to consult a physician, but was not informed that the physician was to be provided by the employer, in fact, the representative of the employer conveyed the opposite idea. Claimant treated his own hands for two weeks and then received treatment at the Hartford Hospital. Had medical treatment been obtained earlier, the period of disability would have been much shortened. The court held that the claimant was not guilty of such willful misconduct as would preclude a recovery.¹⁸

A lineman was killed by coming in contact with a wire charged with electricity. He was guilty of contributory negligence or an infraction of a rule of the company, which rule was enforced with little or no diligence. It was held that decedent was not guilty of such willful misconduct as would defeat a recovery, for there must be shown an intentional disobedience to a strictly enforced rule, to support the defense of willful misconduct.¹⁹

An employee engaged in painting the inside of tank cars was overcome by the poisonous fumes arising from the paint and died. Employees were furnished with respirators and forbidden to work inside of the cars without a respirator. On the night in question the respirator would not work and deceased went in without it. It was held that he was not guilty of willful misconduct, active, refusal, reckless, disregard or failure to perform a duty. It amounted to nothing more than thoughtlessness, inattention, heedlessness, or nonconformity to rules.²⁰

18. *Rainey v. Tunnel Coal Co.*, 93 Conn. 90, 105 Atl. 333, 3 W. C. L. J. 227; *Hall v. J. LaCourciere Co.*, 93 Conn. 1, 104 Atl. 348, 2 W. C. L. J. 769, 17 N. C. C. A. 390.

19. *In re Isaac Bryant*, 3rd A. R. U. S. C. C. 181; *In re Wm. J. Corkey*, 3rd A. R. U. S. C. C. 182; *Indianapolis Light & Heat Co. v. Fitzwater*, — Ind. App. —, 121 N. E. 126, 3 W. C. L. J. 284; *Mallors v. Industrial Bd. of Ill.*, 281 Ill. 418, 117 N. E. 1056, 1 W. C. L. J. 522; *Chicago Rys. Co. v. Indus. Bd. of Ill.*, 276 Ill. 112, 114 N. E. 534, 15 N. C. C. A. 164; *Mississippi River Power Co. v. Indus. Comm.*, 289 Ill. 353, 124 N. E. Rep. 552, 5 W. C. L. J. 50; *In re Marian Scariano*, 3rd A. R. U. S. C. C. 181.

20. *General American Tank Car Corporation v. Borchardt*, — Ind. App. —, 122 N. E. 433, 3 W. C. L. J. 700; *National Car Coupler Co. v. Marr*, — Ind. App. —, (1919), 121 N. E. 545, 3 W. C. L. J. 456; *Gurski v. Susquehanna Coal Co.*, 262 Pa. 1, 104 Atl. 801, 17 N. C. C. A. 943.

An employee was killed by an electric shock, received while he was washing up after the day's work, at a place provided for that purpose. It was held that recovery could not be defeated on the grounds that the electric wire was attached to the wash basin for the express purpose of shocking other employees by a practical joker, in the absence of a showing that the injured party was himself a participant in the practical joke, otherwise no willful misconduct can be shown on his part.²¹

An employee, whose duties required him to carry coal to the third floor of a building, was injured while using a lift to get the coal up to the third floor. There was a notice forbidding any one in the shop to use the lift, also a notice stating that the lift was to be used for coal, between 8:30 a. m. and 9 a. m. Applicant, finding no operator at the lift, went and secured an engine tender to operate it and was seriously injured on the way up. An award was made, the county judge holding that the applicant had done nothing to take him outside the scope of his employment. The court of appeal held that the applicant was doing what he was supposed to do, and in getting some one else to operate the lift and not touching it himself, he was doing all that was required of him.²²

A family servant was burned to death when she attempted to light a fire by the use of wood alcohol. The court held that she was not guilty of willful misconduct in disobeying the orders against using a forbidden means of starting the fire, saying: "We must conclude that it arose out of and in the course of the employment unless the disobedience of orders prevents that conclusion. The disobedience of orders in this case was a disobedience of orders as to the way in which the work should be done. The work itself was the very work decedent was expected to do. It was done at the very place where it was meant to be done."²³

21. *Hollenbach Co. v. Hollenbach*, 181 Ky. 262, 204 S. W. 152, 16 N. C. C. A. 879, 2 W. C. L. J. 492.

22. *Marshall v. Joseph Rodgers & Sons, Ltd.*, (1918), W. C. & Ins. Rep. 39, 17 N. C. C. A. 381.

23. *Kolaszynski v. Klie*, 91 N. J. L. 37, 102 Atl. 5, 15 N. C. C. A. 160. *Macechko v. Bowen Mfg. Co.*, 179 N. Y. A. Div. 573, 166 N. Y. S. 822, 15 N. C. C. A. 163; *Zoladtz v. Detroit Auto Specialty Co.*, (Mich.), (1919), 172 N. W. 549, 4 W. C. L. J. 259.

A carpenter met with an accident because he built a scaffold out of condemned timbers. It was held that, since there was a conflict in the evidence as to whether the carpenter was aware of the condition of the timbers, he could not be held guilty of willful misconduct, and compensation was awarded.²⁴

A fellow employee was overcome by poisonous gas in a wine vat, and the foreman called for help and deceased responded, and after rescuing his fellow employee was himself overcome and died. In holding that deceased was not guilty of willful misconduct in entering the wine vat contrary to the commands and order of his superiors pertaining to the entrance into such vats before they had been cleansed by water, the court said: "The conclusion, when all the facts and circumstances in the case are considered, that appellant's superintendent and foreman intended, by the remarks made by the deceased at the time he was preparing to enter the vat, to simply warn him of the danger of doing so, and a mere protest against it, and not in the sense of a command not to do so, or as forbidding the act, is not unreasonable and unwarranted, and we are unwilling to disturb the judgment of the trial court for the reason urged by appellant under the assignment under consideration."²⁵

An employee was killed while blasting concrete foundations with dynamite. The employer contended that deceased was guilty of willful misconduct in violating a city ordinance, by using 1½ and 2 sticks of dynamite instead of one as provided in the ordinance. It was not shown that this violation of the ordinance was the proximate cause of the death, and since there was no showing of willful misconduct, which is an affirmative defense that the employer must set up, compensation was awarded.²⁶

Where an accident board found that deceased came to his death as the result of an accident, which was caused by deceased's state

24. *Harrison v. Ford*, (1915), W. E. & Ins. Rep. 272, 15 N. C. C. A. 163.

25. *General Acc. Fire & Life Assur. Corp. Ltd. v. Evans*, (Tex. Civ. App.), 201 S. W. 705, 17 N. C. C. A. 382, 1 W. C. L. J. 1148; *Kent v. Boyne City Chemical Co.*, 159 Mich. 671, 162 N. W. 268, 15 N. C. C. A. 163.

26. *Rosedale Cemetery Assn. v. Indus. Acc. Comm. of Cal.*, 37 Cal. App. 706, 174 Pac. 351, 17 N. C. C. A. 389, 2 W. C. L. J. 754.

of intoxication, but further found that deceased was not guilty of willful misconduct in getting into such a condition, the Appellate Court held, that every condition of intoxication, even when voluntarily entered into, does not constitute willful misconduct, and as there was sufficient evidence here to justify the finding of the board their finding is final.²⁷

A miner was killed while riding in a tub, a practise engaged in for the amusement of the employees, but forbidden by the employer. The Appellate Court held that since the practise had been going on, despite the prohibition, the applicant should be allowed to show that the employer knew of and winked at the practise.²⁸

Where a workman, employed on a roof some twenty feet above the ground, when the call for lunch was made, came down on a rope instead of using a ladder provided for such purpose, it was held that he was not guilty of such intentional and willful misconduct as would defeat a claim for compensation.²⁹

Where the outcome of an operation is not problematical or attended with unusual risk, a willful, unreasonable refusal on the part of the injured employee will suspend the liability of the employer during the time such wilful refusal continues. If the injured employee absolutely refuses to submit to a reasonable operation the continued disability will be attributed to his willful misconduct and not to the injury.³⁰

27. *Nekoosa-Edwards Paper Co. v. Industrial Comm. of Wis.*, 154 Wis. 105, 141 N. W. 1013, L. R. A. 1916A, 348, 3 N. C. C. A. 661; *Hahneman Hospital v. Indus. Bd.*, 282 Ill. 316, 118 N. E. 767, 1 W. C. L. J. 754.

28. *Waddell v. Coltness Iron Co.*, (1913) W. C. & Ins. Rep. 42, (1912), 2 Sc. L. T. 301, 4 N. C. C. A. 887; *Tomlinson v. Garratts Ltd.*, (1913), W. C. & Ins. Rep. 416, 4 N. C. C. A. 887; *Casey v. Humphries*, (1913), W. C. & Ins. Rep. 485, 4 N. C. C. A. 881; *Sesser Coal Co. v. Indus. Comm.*, — Ill. —, (1921), 129 N. E. 536.

29. *Clem v. Chalmers Motor Co.*, 178 Mich. 340, 144 N. W. 848, 4 N. C. C. A. 876 L. R. A. (1916), A 352; *Chicago Rys. Co. v. Indus. Bd.*, 277 Ill. 512, 115 N. E. 647.

30. *Kricinovich v. American Car. Co.*, 192 Mich. 687, 159 N. W. 362, 15 N. C. C. A. 79; *Lesh v. Ill. Steel Co.*, 163, Wis. 124, 157 N. W. 539, 15 N. C. C. A. 80; *Marshall v. Ransome Concrete Co.*, 33 Cal. App. 782, 166 Pac. 846, 15 N. C. C. A. 83; *Bruce v. Taylor & Maliskey*, 192 Mich. 34, 14 N. C. C. A. 145, 158 N. W. 153; *Hall v. I. LaCourciere Co.*, 104 Atl. 348, 93 Conn. 1, 2 W. C. L. J. 769, 17 N. C. C. A. 390; *Walsh v. Locke & Co.*, (1914), W. C. & Ins. Rep. 98, 6 N. C. C. A. 675.

"The deceased, as a laborer, was obliged to pass from one part of his employer's premises to another. Instead of walking all the way, as indeed he might have done, he undertook to ride upon his employer's truck going the same way. In passing from one point to another upon the employer's premises he was doing what his employment necessarily called for. That he should attempt to ride when the opportunity offered, was not a departure from his employer's business. It is not found, nor is there any presumption, that any danger was attendant upon such riding. Such attempt to ride was, as matter of common experience, an ordinary and to be expected incident of his employment. He was doing what his employment called for, not necessarily the riding, but the moving from place to place. Upon the finding, the act of the decedent was not done in violation of any orders received by him, and it was manifestly in furtherance of the performances of his duties. Had the deceased slipped and been injured while walking from one place of work to another on his employer's premises in the course of his work, it would hardly be claimed that the injury did not arise out of the employment. What difference did it make that he slipped while attempting to get on the truck for the same purpose?' Furthermore as long as he was violating no specific, enforced rule he was not guilty of willful misconduct."³¹

Where it was contended that claimant had no right under any circumstances to board a moving train and therefore that his injury did not arise out of the employment, the appellate court held that where the Industrial Board found that there was sufficient evidence to support a finding that the employee was not guilty of willful misconduct in riding on the foot-board in the rear of an engine, the appellate court would not disturb such a finding.³²

Where smoking was forbidden but the carrying of matches was not forbidden an employee injured, as a result of the matches

31. *Fiarenzo v. Richards & Co. et al.*, 93 Conn 581, 107 Atl. Rep. 563, 4 W. C. L. J. 599.

32. *Decatur Railway & Light Co. v. Indus. Bd. of Ill.*, 276 Ill. 472, 114 N. E. 915, 14 N. C. C. A. 139.

setting on fire his oil soaked clothing, cannot be said as a matter of law to be without the protection of the Illinois Act.³³

The use of a freight elevator in leaving work by a female employee did not amount to willful misconduct, but in using it she placed herself without the scope of her employment so the injury did not arise out of the employment.³⁴

Where a driver of a truck and deceased, employees of a teamster, sent to haul goods to a station after loading boxes, which were on a platform, used an elevator to move goods to a top floor, they did not depart from the scope of their employment, and riding on the elevator with the boxes did not amount to a deliberate and reckless indifference to danger which would bar a recovery.^{34a}

§ 284. **Acts Constituting Willful Misconduct.**—Injuries sustained in an automobile accident by an employee, who had been strictly forbidden to use the automobile in the carrying out of his duties, did not arise out of the employment.³⁵

Where a coal miner violated an enforced rule of the company in advancing to where a shot had missed fire, before the stipulated time had elapsed, as provided for in such cases, it was held that he was guilty of such misconduct as would preclude a recovery.³⁶

Where a boy in a mine was knocked from a truck upon which he was riding, a practice which was strictly forbidden, as the boy well knew, the court held that the boy was guilty of wilful misconduct.³⁷

Where a chauffeur was killed in a fight which he began with another chauffeur to see who would load bricks first, it was held

33. *Steel Sales Corp. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 698, 6 W. C. L. J. 303.

34. *Dulac v. Dumbarton Woolen Mills*, — Me. —, (1921), 112 Atl. 710.

34a. *Colbourn v. Nichols*, 109 Atl. 882, — Del. Sup. Ct. —, (1920), 6 W. C. L. J. 140.

35. *Reimers v. Proctor Publishing Co.*, 85 N. J. L. 441, 89 Atl. 931, 4 N. C. C. A. 738; *In Re Geo. Walters*, 2nd A. R. U. S. C. C. 281; *In Re Henry Young*, 2nd A. R. U. S. C. C. 283.

36. *M'Kenna v. Niddrie v. Benhr Coal Co., Ltd.*, (1915), W. C. & Ins. Rep. 505, (1915), 2 Sc. L. T. 234, 15 N. C. C. A. 166.

37. *Madew v. Chatterley Whitfield Collieries, Ltd.*, (1917), 2 K. B. 742, 15 N. C. C. A. 166.

that he was guilty of wilful misconduct of a nature to preclude recovery, when he engaged in an undertaking which was destined to bring about the injury or death of himself or another, within the meaning of the exception in Section 10 of the New York Act.³⁸

A machinist's helper omitted to wear goggles while at dangerous work, merely because he disliked the goggles, which was contrary to rules and specific instructions. It was held that the action of the employee on this occasion amounted to wilful misconduct.³⁹

A foreman entered a transformer room and was electrocuted. He was cautioned, by signs, not to enter this room. His duties did not require his presence in the room, and he was conscious of the danger. In holding that the wilful misconduct of the employee precluded a recovery, the court said: "There is no evidence in this record which fairly tends to prove that the accident arose out of and in the course of the employment of the deceased. The transformer room in the plant of the plaintiff in error was a place of great danger. Realizing this, plaintiff in error properly took every precaution to exclude the public and all of its employees except those whose duties required them to enter or pass through the room. There was thus created within the plant a zone which the deceased was forbidden to enter. In disobedience of the rules of plaintiff in error he entered this zone, and the accident which resulted in injury to him cannot be said to have arisen out of and in the course of his employment."⁴⁰

An employee was injured while using his hand to clear away sand from the top of a machine, instead of using a scraper provided for that purpose, because he could make more money each week if he did the work by hand instead of using the scraper. It was held that since he had been specifically instructed to use the

38. *Stillwagon v. Callan Bros.*, 183 App. Div. 141, 170 N. Y. S. 677, 2 W. C. L. J. 379.

39. *McAdoo v. Indus. Acc. Comm.*, (Cal.), 181 Pac. 400, 4 W. C. L. J. 476; *Pac. Coast Casualty Co. v. Pillsbury*, 31 Cal. App. 701, 162 Pac. 1040, 14 N. C. C. A. 135.

40. *Northern Illinois Light & Traction Co. v. Industrial Board of Ill.*, 279 Ill. 565, 117 N. E. 95, 15 N. C. C. A. 158.

scraper, which was safe, the applicant's conduct was of such a deliberate character as to preclude recovery.⁴¹

An experienced laundryman, while operating a wringing machine, removed a guard to save time. He knew it was provided for his safety. He was held to be guilty of wilful misconduct, and could not recover for resulting injuries, the removal of the guard being intentional, deliberate and willful, because done for a definite purpose.⁴²

Where a railroad engineer sustained injuries in a collision, which was brought about by his own violation of rules of the company, promulgated for the government of his conduct, he cannot recover because such violation amounts to wilful misconduct on the part of the injured party.⁴³

A night watchman was killed when he fell down a chute. The evidence tended to establish that decedent procured a chair and sat down at the entrance to the chute, when he dozed off to sleep and lost his balance, falling down the chute. It was not shown that he was allowed to abandon his duties for this purpose. The court held that, while the rule pertaining to wilful misconduct was inapplicable, still the act of decedent was not incident to his employment, was not authorized or induced by his employer in connection with his employment, and therefore did not arise out of his employment.⁴⁴

An employee was killed when he attempted to leave an elevator while it was in motion. Deceased and the elevator operator were engaged in horseplay at the time of the accident. The court held

41. *Gaunt v. Babcock & Wilcox Ltd.*, (1918), W. C. & Ins. Rep. 10, 17 N. C. C. A. 384.

42. *Bay Shore Laundry Co. v. Indus. Acc. Comm. of Cal.*, 36 Cal. App. 547, 172 Pac. 1128, 2 W. C. L. J. 207, 17 N. C. C. A. 387; *Wardle v. Enthoven & Sons, Ltd.*, (1917), W. C. & Ins. Rep. 18, 86 L. J. K. B. 309, 15 N. C. C. A. 154; *Bischoff v. American Car & Foundry Co.*, 190 Mich. 229, 157 N. W. 34, 15 N. C. C. A. 155; *Pac. Coast Casualty Co. v. Pillsbury*, 31 Cal. App. 701, 162 Pac. 1040, 15 N. C. C. A. 156.

43. *Rask v. Atchison, T. & S. F. Ry. Co.*, 103 Kan. 440, 173 Pac. 1066, 2 W. C. L. J. 629; *Eugene Dietzen Co. v. Indus. Bd. of Ill.*, 279 Ill. 11, 116 N. E. 684, 14 N. C. C. A. 125; *In re O. Black*, 3rd A. R. U. S. C. C. 180.

44. *Gifford v. Patterson*, 222 N. Y. 4, 117 N. E. 946, 1 W. C. L. J. 434.

that decedent was guilty of wilful negligence, even though it is conceded that the accident arose out of and in the course of the employment. Therefore applicant was precluded from recovering.⁴⁵

Where a statute relieves an employer from liability when an employee willfully refused to use a guard or protection against accidents, furnished for his use pursuant to a statute or by order of the State Labor Commissioner, the mere voluntary and intentional failure to use such appliance does not necessarily render the omission wilful. The wilful failure contemplated carries with it the idea of premeditation, obstinacy and intentional wrong doing. The question of wilful refusal must be determined by the industrial commission, and if there is any evidence to support the finding of the board, it will not be disturbed.⁴⁶

An employee who was injured while violating a penal statute, fixing a speed limit, is guilty of "wilful misconduct" under the workman's compensation act.⁴⁷

The right to compensation is cut off by intoxication only if the intoxication was the sole cause of the injury.⁴⁸

Where a police officer was shot by a person he attempted to arrest, recovery could not be had where the statute excluded injuries resulting from the intentional acts of another. "The plaintiffs in error, claimants before the commission, contend, in effect, that the above-quoted clause of section 8, of the statute of 1915, should not be literally construed, but that the words 'injury intentionally inflicted by another' should be interpreted to refer only to an injury intentionally inflicted by another for reasons

45. *Feda v. Cudahy Packing Co.*, 166 N. W. 190, 102 Nebr. 110, 1 W. C. L. J. 649; *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N. W. 509, L. R. A. 1916D, 970; see also, L. R. A. 1916A, p. 47, note 93, and R. 240, note 17a.

46. *Wick v. Gunn*, — Okla. —, 4 Am. L. R. 107, 169 Pac. 1087, 1 W. C. L. J. 716, 17 N. C. C. A. 377; *Great Western Electric Chemical Co. v. Indus. Acc. Comm.*, 35 Cal. App. 450, 170 Pac. 165, 1 W. C. L. J. 491, 17 N. C. C. A. 383.

47. *Fidelity etc. Co. v. Industrial Acc. Comm.*, 171 Cal. 728, 654 Pac. 834, L. R. A. 1916D, 903.

48. *American Ice Co. v. Fitzhugh*, 128 Md. 382, 97 Atl. 999, Ann. Cas. 1917D, 33; *Roebbling Son's Co. v. Indus. Acc. Comm.*, 36 Cal. App. 10, 171 Pac. 987, 2 W. C. L. J. 38.

personal to the assailant, and not to relate to, or include, any injury which although inflicted intentionally by a third person, was one caused by the employment, or arose as the result of a peril incident to the employment as in the instant case. However much the construction contended for would result in harmonizing section 8 with the general purpose of the Workmen's Compensation Act, nevertheless the contention cannot be sustained. The clause and phrase in question is clear and explicit, and must be enforced according to its plain meaning. As said in *Hause v. Rose*, 6 Colo. 26: 'We cannot, as a court, supply omissions, nor make law to fit an exceptional case. * * * The statute, being explicit, does not admit of interpretation beyond its express letter, and must be administered as we find it.' ⁴⁹

Section 6b of the California Workmen's Compensation Act authorizes increased compensation when the employer is guilty of "serious misconduct." In defining this term the supreme court of California said: "Serious misconduct" of an employer must be taken to mean conduct which the employer either knew or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees. It seems clear that according to this test, the commission was amply warranted in finding that the maintenance of the improperly protected shafting immediately over and in close proximity to, the conveyor belt was such serious misconduct." It was further held that the word "officer" as used in that section means one invested with general conduct and control in a particular place of business and was not used in the technical sense as one who is elected or whose office is provided for by the articles of incorporation or by laws.⁵⁰

Where an employee departed from the scope of his employment in violation of orders and as a direct result thereof was accidentally crushed to death, it was held that this death was not caused by an injury arising out of and in the course of the employment.⁵¹

49. *Helburg v. Town of Louisville*, (1919), (Colo.), 180 Pac. 751, 4 W. C. L. J. 152.

50. *E. Clemens Horst Co. v. Indus. A. C. of Calif.*, — Cal. —, 193 Pac. 105, 7 W. C. L. J. 3.

51. *West Side Coal & Mining Co. v. Indus. Comm.*, — Ill. —, (1920), 126 N. E. 218, 5 W. C. L. J. 686.

§ 285. **Sportive Acts.**—Girls employed in a factory were in the habit of amusing themselves, during the lunch period, by riding on trucks in the factory, with the permission of the foreman, but contrary to instructions of the employer. While thus engaged, applicant fell from the truck, injuring her knee and ankle. It was held that since this play had become a settled custom, with the knowledge and express approval of the foreman in charge, her injury might be regarded as having arisen out of her employment.⁵³

An employee was injured when he came in contact with an electric wire, which had been fastened to a knob of a washroom door, through which he was compelled to pass to reach the washroom at the close of the day's work. "It was shown that plaintiff's foreman, the man who directed his work, was one of the perpetrators of the mischief which injured the plaintiff. This foreman knew that this particular prank had become a custom on the employer's premises. Defendant contends that this person was not a foreman, but the great weight of the evidence is to the contrary. It is true that this foreman had no general authority, but he was the person whom plaintiff had to obey while in defendant's employment." Compensation was allowed.⁵⁴

A fellow employee either innocently or maliciously, placed an air hose against claimant's body. The hose slipped down against claimant's rectum. At first the hose was dead, but another employee turned on the air. As a result claimant's rectum was ruptured for a distance of five inches, necessitating an operation. In reversing an award for compensation, the Supreme Court held that, while the accident arose in the course of the employment, it did not arise out of it, the court saying that the Workman's Compensation Act covered industrial accidents only, and that it

53. *Thomas v. Proctor and Gamble Mfg. Co.*, 104 Kan. 432, 179 Pac. 372, (1919), 18 N. C. C. A. 1044, 3 W. C. L. J. 712.

54. *White v. Kansas City Stockyards Co.*, 104 Kan. 90, 177 Pac. 522, (1919), 18 N. C. C. A. 1044, 3 W. C. L. J. 476; *Hollenbach Co. v. Hollenbach*, 181 Ky. 262, 204 S. W. 152, 16 N. C. C. A. 879, 2 W. C. L. J. 492. For facts of last case see page 633 ante.

could not be said that sportive acts are industrial accidents arising out of the employment.⁵⁵

An employee was injured while standing in line to receive his pay, when the men in the line began pushing forward and backwards, causing applicant to slip and fall upon a concrete floor. The court held that the accident arose out of and in the course of the employment.⁵⁶

Claimant lost the vision of his eye as a result of being struck by a missile thrown by a fellow employee in horseplay. This practise had been going on for some time, but claimant had never participated in it, and was known, or by the exercise of ordinary care could have been known to the employer. Affirming an award in favor of claimant, the court said: "The rule is well enough settled that where workmen step aside from their employment and engage in horseplay or practical joking, or so engage while continuing their work and accidental injury results, and in general where one in sport or mischief does some act resulting in injury to a fellow worker, the injury is not one arising out of the employment within the meaning of the compensation Acts. * * * Here we conceive the situation to be different. Filas was exposed by his employment to the risks of injury from the throwing of sash pins in sport and mischief. He did not himself engage in the sport. His employer did not stop it. The risk continued. The accident was the natural result of the missile-throwing proclivities of some of Filas' fellow workers and was a risk of the work as it was conducted."⁵⁷

55. *Tarpper v. Weston Mott Co.*, 200 Mich. 275, 166 N. W. 857, 16 N. C. C. A. 923, 1 W. C. L. J. 1040; *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, 156 N. W. 143, L. R. A. 1916D, 968, 12 N. C. C. A. 795; *Furniss v. Gartside*, 3 B. W. C. C. 411; *Cole v. Evans*, 4 B. W. C. C. 138; *Ballarde Adm'x v. Louisville & N. R. Co.*, 128 Ky. 826, 16 L. R. A. (N. S.) 1052, 110 S. W. 296, 13 N. C. C. A. 664; *Payne v. Indus. Comm.*, — Ill. —, 129 N. E. 122, (1920), 7 W. C. L. J. 276.

56. *Pekin Cooperage Co. v. Indus. Bd. of Ill.*, 277 Ill. 53, 115 N. E. 128, 16 N. C. C. A. 635; *Markell v. Daniel Green Felt Shoe Co.*, 221 N. Y. 493, 116 N. E. 1060, 15 N. C. C. A. 285.

57. *State ex rel. Johnson Sash & Door Co. v. Dist. Court of Hennepin County*, 140 Minn. 73, 167 N. W. 283, 16 N. C. C. A. 921, 2 W. C. L. J. 95.

A mortar mixer sustained an injury to his eye, by being struck with a lump of mortar from above. There was evidence tending to establish that the mortar was thrown by an employee from the upper scaffold in horseplay, and that this particular employee was in the habit of indulging in horseplay to the knowledge of the employer. The court said: "Where a workman, known by his master to be in the habit of indulging in dangerous play with his fellow workmen, is retained in his master's employ, the danger of injury from such play becomes an incident of the employment of the other workmen, and injury to any of the other workmen, while performing regular work, caused by such play, comes within the provisions of the workmen's compensation act."⁵⁸

An employee was electrocuted as the result of a practical joke of a fellow employee. This practise of horseplay was not known nor assented to by the employer. The court said on affirming an award: "Here the deceased in the usual course of his duty was required to work upon the conduit at the place in question and at the time of his death was engaged in the performance of his duties and had not in the slightest degree departed therefrom, and while so engaged he was instantly killed. We think it must be said under such circumstances that the deceased was performing a service growing out of and incidental to his employment. The accident was one that followed as a natural incident to the work performed. The hazard was one to which the decedent would not have been equally exposed apart from his employment. The danger was one peculiar to his work and not common to the neighborhood."⁵⁹

An employee fell and was injured when he attempted to dodge a blow directed at him by a fellow employee in horseplay, and the injuries resulted in his death. The court said: "An employer is not liable, under the Workmen's Compensation Act (P. L. 1911,

58. *Stuart v. Kansas City*, 102 Kan. 307, 171 Pac. 913, 16 N. C. C. A. 923, 2 W. C. L. J. 58.

59. *Newport Hydro-Carbon Co. v. Indus. Comm. of Wis.*, 167 Wis. 630, 167 N. W. 749, 16 N. C. C. A. 924, 2 W. C. L. J. 421.

p. 134), to make compensation for injury to an employee which was the result of horseplay or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for, while an accident, happening in such circumstances may arise in the course of, it cannot be said to arise out of, the employment.⁶⁰

Where an employee was injured when the assistant Superintendent, in sport, turned an air compressor upon him, it was held that the accident arose out of the employment, since the habit of so using the air compressor was known to the employer and not prohibited.⁶¹

Under the New York Workmen's Compensation law it was held that compensation might be granted to a workman whose eye was injured by a fellow servant as the result of a quarrel over their work, though the facts indicated skylarking on the part of the employee who caused the injury.⁶²

Where an elevator operator left his post to scuffle with a fellow employee and sustained injuries, it was held that the injury did not arise out of the employment.⁶³

Two employees engaged in a scuffle, and were stopped by the foreman and ordered back to work. Subsequently T. struck the applicant on the head with an ice pick, fracturing his skull and rendering him unconscious. Reversing a judgment, holding that the accident arose out of the employment, the court said: We think that because of the skylarking which came under the observation of the president and superintendent of the ice com-

60. *Hully v. Moosbrugger*, 88 N. J. L. 161, 95 Atl. 1007, 12 N. C. C. A. 795, L. R. A. 1916C, Rev'g 93 Atl. 75, 8 N. C. C. A. 283; *Garrett v. Louisville & N. R. Co.*, 196 Ala. 52, 71 So. 685, 13 N. C. C. A. 663;; *Terlecki v. Straus*, 86 N. J. L. 708, 92 Atl. 1087; *Schmoll v. Weisbrod & Hess Brg. Co.*, 89 N. J. L. 150, 97 Atl. 723.

61. *In Re Loper*, 64 Ind. App. —, 116 N. E. 324.

62. *In Re Heitz*, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. Affirming order *Heitz v. Ruppert*, 171 N. Y. A. D. 961, 155 N. Y. S. 1112, 14 N. C. C. A. 227, and reargument denied in 218 N. Y. 702, 113 N. E. 1057. But see New York Case at end of this section, *Leonbruno v. Chaplin Silk Mills*, 183 N. Y. S. 222. *Aff'd.* in 128 N. E. 711.

63. *Re Moore*, 225 Mass. 258, 114 N. E. 204; *Burton v. Eggette Coal Co.*, 37 N. J. L. 271, 9 N. C. C. A. 663.

pany's plant, namely, skylarking between those boys, charged the president and superintendent with contemplating no more than that the same might occur again, that is skylarking or horseplay, not that one boy might thereafter commit an atrocious assault upon the other."⁶⁴

An employee fell down a stairs, as the result of being tickled in the ribs with a newspaper by a fellow employee. The court held that an accident resulting from one employee playing a trick upon another, though without malice, cannot be said to arise out of the employment, merely because such practises have been sanctioned by a custom existing among such employees. To entitle the injured employee to compensation the injury must have resulted from a risk reasonably incident to the employment, and, while it need not have been foreseen or expected, it must, after the event appear to have flowed from that source as a rational consequence."⁶⁵

Where a boy was injured by being struck in the eye by a chunk of coal thrown by a fellow employee in horseplay, the arbitrator found that the accident arose out of the employment, because the circumstances of the boy's employment were such as to expose him to special risk of stones being thrown by other boys engaged in the same work of picking stones out of the coal. On appeal to the House of Lords this judgment was affirmed.⁶⁶

An employee had his hand crushed by a trip-hammer, when he attempted to remove a tin can placed upon the plate of the hammer by a fellow employee in sport. It was held that the accident arose out of and in the course of the employment, it appearing that the workman took no part in the sport, but simply sought to clear the die of the obstruction so he could continue work. "Had Knopp been engaged in joking with Novak or playing with him, and in carrying on their pranks, Novak would put the can on the die and Knopp removed it, both entering into the spirit of the

64. *Mountain Ice Co. v. McNeil*, 91 N. J. L. 528, 103 Atl. 184; Rev'g — N. J. L. —, 103 Atl. 912, 2 W. C. L. J. 532.

65. *Coronada Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, 12 N. C. C. A. 789, L. R. A. 1916F, 1164.

66. *Clayton v. Hardwick Colliery Co., Ltd.*, (1916), W. C. & Ins. Rep. 33, 12 N. C. C. A. 791; Rev'g (1914) W. C. & Ins. Rep. 343, 11 N. C. C. A. 237.

transaction in concert, it may be that appellee could not be held to have received his injury in the course of his employment. But in this case appellee took no part in the joking himself, but proceeded to clear the die of the obstruction upon it so that he could continue the work he was employed by appellant to do, and what he did was for the benefit of his employer."⁶⁷

Where section men were propelling a hand car at a high rate of speed for their own amusement and thereby caused plaintiff to lose his hold on the handle bars and to fall from the car, sustaining injuries, it was held that in negligently overspeeding the car the men were engaged in the performance of their duty to the master, and were acting within the scope of their employment, and therefore the master was liable. The court said that the employees were charged with negligently performing the very act which it was their duty to perform, that is to propel the car, and that in overspeeding it they negligently conducted the master's business.⁶⁸

A shirt factory employee, while in one of two adjoining toilet rooms, felt something touch her arm, and while looking through a crack to see where the article came from, another employee thrust some scissors through the crack into her right eye. It was held that the injury resulted solely from the sportive act of a co-worker, who in no way represented the master, and which act in no way grew out of or was connected with the employment.⁶⁹

In a recent New York case the appellate Division held that sportive acts are as much an element of risk in an occupation as any other element that enters into such risks. This decision was affirmed by the court of appeals. The opinion in full follows:

"The claimant while engaged in the performance of his duties, in the employer's factory was struck by an apple which one of his fellow servants, a boy, was throwing in sport at another, and as a consequence lost the better part of the sight on one eye. He did

67. *Knopp v. American Car and Foundry Co.*, 186 Ill. App. 605, 5 N. C. C. A. 798.

68. *Soderlund v. Chicago, M. & St. P. Ry. Co.*, 102 Minn. 240, 113 N. W. 449, 5 N. C. C. A. 801.

69. *De Fillipis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761, 12 N. C. C. A. 558.

not participate in the horseplay, and had no knowledge of it till injured. The question is whether the accident was one 'arising out of and in the course of employment,' within the meaning of the statute (Workmen's Compensation Law, Par. 3, Subd. 7; Consol. Laws, c. 67).

"(1) That it arose 'in the course of employment' is unquestioned. That it arose 'out of' employment, we now hold. The claimant's presence in a factory in association with other workmen involved exposure to the risk of injury from the careless acts of those about him. He was brought by the conditions of his work 'within the zone of special danger.' *Thom v. Sinclair*, 1917 A. C. 127, 142. Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service. We think with Kalisch, J., in *Hully v. Moosbrugger*, 87 N. J. Law, 103, 93 At. 79. that it was 'but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age or even of maturer years to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman, is a matter of common knowledge to every one who employs labor.' The claimant was injured not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment. *Thom v. Sinclair*, *supra*; *Matter of Redner v. Faber & Son*, 223 N. Y. 379, 119 N. E. 842.

"(2) We think the precedents in this state, whatever variance of view there may be in other jurisdictions, sustain our present ruling. This case is not within the principle of *Matter of De Filippis v. Falkenberg*, 219 N. Y. 581, 114 N. E. 1064, and *Matter of Stillwagon v. Callan Brothers*, 224 N. Y. 714, 121 N. E. 893, where the claimant, joining in the horseplay, had stepped aside from the employment. Cf. *Matter of Di Salvio v. Meihan Co.*, 225 N. Y. 123, 121 N. E. 766. This case is rather within the principle of *Matter of Verschleiser v. Stern & Son*, 229 N. Y. 192, 128 N. E. 126, where the claimant, while engaged in his work, was assaulted by fellow workmen who wished to tease and harass

him. Cf. *Markell v. Green Felt Shoe Co.*, 221 N. Y. 493, 116 N. E. 1060; *Matter of Heitz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. We do not overlook the cases in other jurisdictions. *Hulley v. Moosbrugger*, *supra*, was reversed by the New Jersey Court of Errors and Appeals in 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203. It is in accord, however, with a decision of the Supreme Court of Illinois. *Pekin Cooperage Co. v. Industrial Board*, 277 Ill. 53, 115 N. E. 128. English cases hostile to the award (*Armitage v. Lancashire & Yorkshire Ry. Co.*, 1902, 2 K. B. 178; *Fitzgerald v. Clarke & Son*, 1908, 2 K. B. 796) are inconsistent, it would seem, in principle with later rulings of the House of Lords (*Thom v. Sinclair*, *supra*; *Dennis v. White & Co.*, 1917, A. C. 479. Cf. *Matter of Redner v. Faber & Son*, *supra*, and *Matter of Grieb v. Hammerle*, 222 N. Y. 382, 118 N. E. 805). They are certainly inconsistent, with the broader conception of employment and its incidents to which this court is now committed. *Matter of Verschleiser v. Stern & Son*, *supra*. The risks of injury incurred in the crowded contacts of the factory though the acts of fellow workmen are not measured by the tendency of such acts to serve the master's business. Many things that have no such tendency are done by workmen every day. The test of liability under the statute is not the master's dereliction, whether his own or that of his representatives acting within the scope of their authority. The test of liability is the relation of the service to the injury, of the employment to the risk."⁷⁰

Where a group of employees had left their work and gathered around a fire to warm, a fellow employee voluntarily and intentionally threw a piece of split dynamite into the fire. Those around the fire were warned of the act and all ran away except the one injured and the dynamite exploded and injured him. It was held that since the employee was where he had a right to be the in-

70. *Leonbruno v. Champlain Silk Mills*, 183 N. Y. S. 222, 6 W. C. L. J. 483, *affd.* in 128 N. E. 711, 7 W. C. L. J. 483. *Twin Peaks Canning Co. v. Indus. Comm.*, — Utah —, (1921), 196 Pac. 353; Earlier N. Y. cases held to the contrary, *Griffin v. A. Robertson & Son*, — App. Div. —, 162 N. Y. S. 313, B 1 W. C. L. J. 1327.

jury resulted from a risk reasonably incident to the employment.⁷¹

Where a fellow employee directed a trick camera toward the claimant and a missile from the camera hit him in the eye and the sight of the eye was destroyed, it was held the injury did not arise out of the employment.⁷²

"Where the nature of the employment is such as to expose a worker to a wrongful act by another worker, which may reasonably be said to have been induced by the peculiar conditions of the employment, the manner in which it was carried on, and the appliances required, such an act may reasonably be said to arise out of the employment," even though it was a sportive act of a fellow employee.⁷³

Under the English Workmen's Compensation Act an employee who is injured while skylarking or while in the performance of some sportive act, cannot recover, since the injuries sustained are not regarded as arising out of and in the course of the employment.⁷⁴

§ 286. **Added Risks to Peril.**—Petitioner, a day laborer, while on his way from his sleeping quarters provided by defendants, to begin work, was injured by his foot being crushed by a passing motor car, which, the evidence tended to establish, the petitioner unsuccessfully attempted to board. Affirming a judgment allowing compensation the court said: "In this case there is evidence that the claimant was injured at the site of the camp where he

71. *Willis v. State Indus. Comm.*, 78 Okla. 216, 190 Pac. 92.

72. *Fishering v. Pillsbury*, 172 Cal. 690, 158 Pac. 215.

73. *Socha v. Cudahy Packing Co.*, — Neb. —, (1921), 181 N. W. 706; overruling *Pierce v. Boyer-Van Kuran Lbr. Co.*, 99 Neb. 321, 156 N. W. 509, L. R. A. 1916D, 970, in so far as it conflicts with the principles announced in that case.

74. *Wilson v. Laing*, (1909), Ct. of Sess, 1230, 46 Scot. Law Rep. 843, 2 Scot. L. T. 18, 2 B. W. C. C. 118, 3 N. C. C. A. 283; *Wrigley v. Nasmyth, Wilson & Co.*, (1913), W. C. & Ins. Rep. 145, 3 N. C. C. A. 283; see *Fitzgerald v. Clarke & Son*, (1908), 2 K. B. 796, 1 B. W. C. C. 197, 99 Law Times Rep. 101, 77 L. J. K. B. 1018; *Mullen v. D. Y. Stewart & Co., Ltd.*, (1908), Court of Session, 991, 45 Scot. Law Rep. 729, 1 B. W. C. C. 204; *Shaw v. Wigan Coal & Iron Co.*, 3 B. W. C. C. 81, (1909); *Cole v. Evans, Son, Lescher and Webb, Ltd.*, 4 B. W. C. C. 138 (1909).

was employed, and while going to work from the quarters provided by his employers, along a road made for camp purposes, and that the injury was inflicted by a motor truck used by his employers in conveying men to their places of work on the grounds in process of being cleared. Whether the accident occurring under such circumstances arose out of and in the course of the employment was a question of fact which the appellants were not entitled to have withdrawn from the jury on the theory that they had met the burden of proving the contrary."⁷⁵

A truck driver of a street flushing machine was injured when he fell from his truck. It appeared that at the time of the accident he was not driving himself, but was sitting on the seat operating levers which regulated the flow of water from the sprinkler. In an attempt to recover a wrench which was falling, he lost his balance and fell to the ground. On appeal it was contended that in allowing another to drive the truck a practise strictly against the rules of the Company, he had departed from his employment, and took upon himself an added risk not within his employment. Affirming the award the court said: "The employee of Tryon & Brain did not abdicate either the place or character of his employment. He gave up part of his work to another, it is true, as he permitted Schilling to run the truck, but it was strictly within the line of his duty to operate and care for the levers which controlled the flow of water from the tank of the truck to the street. The same may be said of his attempt to prevent the wrench from falling from the footboard. He was not outside the course of his employment merely because he allowed a stranger to perform a part of his task while he was engaged in the performance of the remainder of it."⁷⁶

An employee who was working on a gravel car, remained in the car while it was being switched, and was thrown therefrom and the car ran over his body, inflicting injuries resulting in his death.

75. *Beasman & Co. v. Butler*, (1918), 133 Md. 382, 105 Atl. 409, 3 W. C. L. J. 478, 18 N. C. C. A. 1045.

76. *Employer's Liab. Assur. Corp., Ltd. of London, Eng. v. Indus. Acc. Comm. of Cal.*, 179 Cal. 432, 177 Pac. 171, 17 N. C. C. A. 942, 3 W. C. L. J. 407.

No instructions had ever been issued against riding in the cars while they were being switched. The court, holding that the deceased was where he had a right to be, and that the injury resulting in his death arose out of and in the course of his employment, said: "An injury occurs in the course of the employment, within the meaning of the (Indiana) Workmen's Compensation Act, when it occurs within the period of the employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling the duties of his employment, or is engaged in doing something incidental to it."⁷⁷

Where an employee was killed while operating a metal road grader during an electric storm, it was held that deceased had not increased his natural hazard in so doing, for the metal road grader could not have had any perceptible influence upon the lightning.⁷⁸

Applicant relieved his bowels in a pail and took the pail to empty it in a river and while doing this in the dark he was injured. Lavatories were provided for the use of the workmen, but a practise had sprung up among the workman to use a pail as applicant had done, because time did not permit them to go to the lavatories, and further the lavatories were infested with parasites. The court of Appeals sustained a determination that the accident did not arise out of the employment, holding that the defendant had provided facilities for its workmen, and that applicant had incurred the accident, and exposed himself to a risk which was no part of his employment.⁷⁹

An employee on a ship left his employment for the purpose of going to lunch, by an unusual route, undertaking to go down a scaffolding and ladder on the outside of the ship, a means not intended for his use in leaving the ship at any time, another safe way of leaving having been provided. He lost his hold, fell, and was killed. The court, holding that the accident did not arise out of

77. *Granite Sand & Gravel Co. v. Wiloughby*, — Ind. App. —, 123 N. E. 194, (1919), 4 W. C. L. J. 53, 18 N. C. C. A. 1045.

78. *Wiggins v. Indus. Acc. Bd. of Mont.*, 54 Mont. 335, 170 Pac. 9, 17 N. C. C. A. 246.

79. *Horner v. Wadsworth, Wimbledon & Epsom Gas Co.*, 120 L. T. R. 462, (1919), 18 N. C. C. A. 1046.

his employment, said: "The findings of the commission to the effect that he might have been leaving his work for the purpose of getting more bolts for use therein, or for the purpose of getting fresh air, seem to us to rest upon nothing but conjecture. There is no evidence in the record to sustain them. The fresh air, if he needed it, could have been obtained in a perfectly safe place upon the deck of the vessel, and nearer to the point of his immediate employment than the scaffolding from which he fell, and there seems to have been no bolts or other material necessary to his work to be obtained at the place toward which he was going. It is certain from this record, it seems to us, that he was, as has been said, simply abandoning his work before the hour when he was permitted to leave it. The award is annulled."⁸⁰

An employee was asphyxiated as the result of attempting to heat a compartment of a destroyer by burning coal and coke in a *bogey*, a practice known to the defendant and not objected to. The hatch was closed preventing the escape of fumes. The county court denied compensation, and on appeal the court held that, although this practice was not objected to by defendant, the taking of the *bogey* aboard for purposes of heating was in no way necessary to his work, and deceased had added peril to his employment, therefore the accident did not arise out of the employment.⁸¹

Where a government employee, whose duties required him to receive mail from incoming trains and transfer it to other trains, climbed aboard the car, while it was moving, as had been his custom theretofore, and in so doing slipped and fell, sustaining injuries, the court, in affirming an award, said: "We think the contention of counsel for appellant is too narrow. The mere fact that Behrend might have stood upon the platform and received the mail in that way as was done upon some occasions did not take him outside of the scope of his employment when he received

80. *Moore & Scott Iron Works v. Industrial Acc. Comm. of Cal.*, 36 Cal. App. 582, 172 Pac. 1114, 16 N. C. C. A. 926.

81. *Armistead v. Humber Graving Dock & Engineering Co., Ltd.*, (1918), W. C. & Ins. Rep. 342, 18 N. C. C. A. 1046.

it in a different way and in a way which, doubtless, under the testimony was considered proper.^{'782}

A steamship employee went ashore for provisions, and when returning to the ship attempted to board a tram car while in motion, and sustained injuries. In reversing an award, the court held that the applicant had taken upon himself an added risk or peril not incident to his employment, and therefore, the accident did not arise out of the employment.⁸³

Where an employee attempted to catch a ride on a train which was going in his direction, and in doing so, fell under the train and was injured, the court, in holding that the accident did not arise out of the employment, said: "We think it clear in this case that catching a ride upon cars being switched in and out of the planing mill yard was not a usual and ordinary way for employees of the planing mill to go to and from the place of their employment, and that there is no evidence to sustain a finding to that effect. * * * If it had been the intent of the legislature to make the employer liable for all injuries sustained by the employee after he had completed his services and while he was leaving and still upon the premises of the employer, they would not have limited the employer's liability to injuries sustained while going to and from his employment in the ordinary and usual way."⁸⁴

Deceased went to a floor above the one on which she worked, having permission to do so, and when returning, the lift, upon which she and three others were riding, stuck, and in order to get out through a door, which opened automatically and which was open only about two feet, the occupants attempted to crawl out, and in doing so deceased was caught by the sudden starting of the lift and killed. On appeal the court held that the accident

82. *White v. Indus. Comm. of Wis.*, 167 Wis. 483, 167 N. W. 816, 16 N. C. C. A. 927, 2 W. C. L. J. 428; *Fox v. Rees & Kirby, Ltd.*, (1916), W. C. & Ins. Rep. 339, 15 N. C. C. A. 243.

83. *Byrne v. Larrinaga Steamship Co., Ltd.*, (1918), W. C. & Ins. Rep. 319, 18 N. C. C. A. 1047; *Lynch v. Neuman*, 37 N. J. L. J. 17, 9 N. C. C. A. 661; *In Re Alexander Coplin*, 3rd A. R. U. S. C. C. 176.

84. *Foster-Latimer Lbr. Co. v. Indus. Comm. of Wisconsin*, 167 Wis. 337, 167 N. W. 453, 16 N. C. C. A. 928, 2 W. C. L. J. 199.

was not due to an added peril, but it was her duty to return to the work, and the fact that she did so improperly would not defeat compensation.⁸⁵

An employee, who was expected to report to his employer before 6 p. m., arrived at the station just as the last train for the day was about to leave, and in attempting to board the moving train was injured. In reversing an award the court said: "I am not satisfied that his employment did expose him to railway accidents more than ordinary people. Moreover, this was not a railway accident, and, even assuming that death due to a railway collision between Sheffield and Rotherham might have made the employers liable to pay compensation, wholly different considerations apply to the present case. He exposed himself to an additional risk by doing an unauthorized and illegal act. To say that the act was done in his master's interest, and not for his own pleasure, is not sufficient. There is not a particle of evidence to show what he was doing between 5 p. m., when the joiners left off work, and 5:26 p. m., when the train started. To perform his duty towards his masters he ought to have started earlier to reach the station before 5:26. I think he was not employed to do this illegal act, either expressly or by implication, as incidental to his employment. The risk involved in attempting to get into a train in motion was not a risk reasonably incident to or 'arising out of' his employment."⁸⁶

Where an employee, who attempted to fill a bottle at a bubble fountain for the purpose of drinking therefrom instead of drinking directly as was intended by the employer, and was injured

85. *Gibbons v. British Dyes, Ltd.*, (1918), W. C. & Ins. Rep. 302, 18 N. C. C. A. 1047; *Benson v. Bush*, 104 Kan. 198, (1919), 178 Pac. 747, 3 W. C. L. J. 629. For facts in this case see page 808 post.

86. *Jibb v. Chadwick*, (1915), W. C. & Ins. Rep. 342, 15 N. C. C. A. 248; *In Re Fumicillo*, 219 Mass. 488, 107 N. E. 349, 15 N. C. C. A. 245; *Hadwin v. Shepherd*, (1915), W. C. & Ins. Rep. 503, 15 N. C. C. A. 245; *Lancashire & Yorkshire Ry. v. Highley*, (1917), W. C. & Ins. Rep. 179; *Rev'g*, (1916), W. C. & Ins. Rep. 244, 85 L. J. K. B. 1513, 15 N. C. C. A. 210; *Russell v. Murray, Ltd.*, (1915), W. C. & Ins. Rep. 532; *Morris v. Rowbotham*, (1915), W. C. & Ins. Rep. 67, 15 N. C. C. A. 288; *Whittall v. Stavely Iron & Coal Co., Ltd.*, (1917), W. C. & Ins. Rep. 202, 15 N. C. C. A. 243.

when the bottle burst, the injury did not arise out of the employment, but was due to an added peril imported by the servant himself.⁸⁷

§ 287. **Employer's Willful Misconduct.**—Where a statute legally permits minors to be employed, but not in the particular work to which they are assigned at the time of the injury, it is interpreted by the Wisconsin Court to mean that, under the Wisconsin Act, the statute does not restrict minors, permitted to be employed to the precise work for which they are employed, but permits them to be employed to do any kind of work. Therefore a minor legally permitted to work, but injured while doing work which he is prohibited by statute from being engaged to perform, was within the compensation act, and could not maintain an action at common law, even though the employer was liable to penal punishment for violation of the statute.⁸⁸

A girl under 16 years of age was employed in a factory, contrary to the penal statute in force in the state at the time, and was injured. In an action at common law for damages, it was contended that the proper remedy was under the compensation act. The court held that the workmen's compensation act was not a bar to a common law action for damages, by an infant who was employed in violation of a penal statute, and that the further violation of a provision of the labor law requiring machinery of every description to be properly guarded was evidence of the employer's negligence.⁸⁹ This rule applies even where the infant falsely represented her age. To hold otherwise would be to open the door to wholesale violation of the statute. The adoption of such a rule would be, in effect, to amend the statute by reading into it the word 'know-

87. *Bolden's Case*; *In Re Fisk Rubber Tire Co*; *In Re Travelers Ins. Co.*, — Mass. —, (1920), 126 N. E. 668, 5 W. C. L. J. 861.

88. *Foth v. Macomber & Whyte Rope Co.*, 161 Wis. 549, 11 N. C. C. A. 599, 154 N. W. 369; *Boyle v. A. C. Cheney Piano Action Co.*, 184 N. Y. S. 374, (1920), 7 W. C. L. J. 93.

89. *Wolff v. Fulton Bag and Cotton Mills*, 185 App. D. 436, 173 N. Y. S. 75, 3 W. C. L. J. 354, 17 N. C. C. A. 616; *Waterman Lumber Co., v. Beatty*, — Tex. Civ. App. —, 204 S. W. 448, 17 N. C. C. A. 614; *Kruczkowski v. Polonia Pub. Co.*, 203 Mich. 213, 168 N. W. 932, 17 N. C. C. A. 611; *Maryland Car Co. v. Indus. Comm.*, — Cal. —, 178 Pac. 858, 3 W. C. L. J. 563.

ingly' or other equivalent expression. In some jurisdictions reasonable diligence on the part of the employer to ascertain the truth of a false statement will defeat the alternative liability.⁹⁰ A contrary ruling was made in an earlier New York Case where a minor was employed to operate an elevator, contrary to the provisions of the statute. It was held that the case came under the Compensation Act.⁹¹

"The remedy of compensation afforded by the Workmen's Compensation Insurance and Safety Act is exclusive of all other statutory or common-law remedies, except in the one case provided by subdivision 'b' of section 12. By that subdivision it is provided that an injured employee, instead of presenting to the commission his claim for compensation as provided by the act, may, at his option, maintain in the courts an action at law against his employer to recover damages where all the three following elements co-exist: (1) When the injury is caused by the employer's gross negligence or willful misconduct; (2) when the act or failure to act which is the cause of the injury is the personal act or failure to act on the part of the employer himself, or, if the employer be a corporation, on the part of an elective officer or officers thereof; and (3) when the act or failure to act which is the cause of the injury indicates a willful disregard of the life, limb, or bodily safety of the employees. Without undertaking to state the evidence at length or to discuss it at large, let it suffice to say that unless it appears that defendant consciously violated some order of the commission or some particular safety provisions of the act itself, it was not guilty of 'gross' negligence, simply because it failed to house the gears with which plaintiff brought his arm in contact when attempting to replace the belt. The mere failure to keep the gears in a housing, apart from any willful disregard of some order of the commission, or of some particular safety provisions of the act itself, does not evince such an utter disregard

90. *Acklin Stamping Co., v. Kutz*, 98 Oh. St. 61, 120 N. E. 229, 17 N. C. C. A. 607; *Secklich v. Harris-Emery Co.*, 184 Iowa 1025, 169 N. W. 325, 17 N. C. C. A. 607, 3 W. C. L. J. 129; *Taglinette v. Sidney Worsted Co.*, — R. I. —, 105 Atl. 641, 3 W. C. L. J. 662. See page 79 ante.

91. *Robilotto v. Bartholdi Realty Co.*, 104 Misc. 419, 172 N. Y. Supp. 328, 17 N. C. C. A. 616.

of consequences as to suggest some degree of intent to cause the injury, or to justify the belief that there was a conscious indifference to consequences. 'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.' *In re Burns*, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. *Smith v. Central, etc. Ry. Co.*, 165 Ala. 407, 51 South. 792. Measured by the foregoing standard, it cannot be said that defendant was guilty of 'willful' misconduct merely because it failed to house the gears, unless the housing of the gears was made a duty by some general or special order of the Industrial Accident Commission, or by the Act itself, and some one of the defendant's elective officers, with a willful disregard of the life, limb, or bodily safety of defendant's employees, having actual knowledge of the peril incident to the unhoused gears or having what in law is equivalent to such actual knowledge, consciously failed to house the gears, so as to avert injury."⁹²

Under the Illinois Workmen's Compensation Act, the right of an employee to maintain an action for an injury depends not only upon his proof that it was caused by the corporation employer's intentional omission to properly guard gearings, as required by the factory act, but upon the allegation and proof, by the em-

92. *Helme v. Western Milling Co.* — Cal. App. —, (1919), 185 Pac. 510, 5 W. C. L. J. 143; *Adams v. Iten Biscuit Co.*, — Okla. —, 162 Pac. 938, B 1 W. C. L. J. 1480. But for a contrary holding, see, *Clemens Horst Co. v. Indus. Accident Comm.*, — Cal. —, 193 Pac. 105, 7 W. C. L. J. 3.

ployee, that such omission was committed by the employer's elective officer, in which case it would come under the exception to the act.⁹³

Under the Massachusetts Workmen's Compensation Act, in proceedings for the death of an employee operating an elevator, it was found by the board that the conduct of the employers, in permitting the elevator to be maintained and operated in the condition in which it was at the time of the accident, was not serious and willful misconduct, entitling the employee's representative to double compensation. This was held to be supported by the evidence, for, "Serious and willful misconduct" of a subscriber, as used in the act, involving conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton, and reckless disregard of its probable consequences, cannot be supported by a finding that the employer was grossly negligent.⁹⁴

Under the Ohio Act, an order made by the commission to employers generally, or to a particular employer with reference to safe place of employment, is a lawful and reasonable requirement, and a failure to comply with the provisions of such order, or with a statute or municipal ordinance which prescribes methods to be used to protect the lives, health, etc., of employees, leaves the employer liable to the employee injured by reason of such failure, independently of the compensation act. "Lawful requirement" does not include a general course of conduct, or those duties and obligations of care and caution, which rest upon employers, and all other members of the community, for the protection of life, health and safety.⁹⁵

Under the Minnesota Act, the employment of an apprentice without a license, in the operation of an elevator, was held not

93. *Von Boeckman v. Corn Products Refn. Co.*, 274 Ill. 605, 113 N. E. 902.

94. *Beckles Case*, 230 Mass. 272, 119 N. E. 653, 2 W. C. L. J. 278, 17 N. C. C. A. 434; *Riley v. Standard Acc. Ins. Co.*, — Mass. —, 116 N. E. 259, A. 1 W. C. L. J. 858.

95. *American Wooden Ware Mfg. Co. v. Schorling*, 96 Ohio 305, 117 N. E. 366, 1 W. C. L. J. 106.

to be violative of the statute, where the evidence did not show that it was intended that he should operate the elevator alone.⁹⁶

Under the Oregon Act, in seeking a recovery in addition to payments from the accident fund, as provided in cases of injury resulting from "deliberate intention" of the employer, it must be shown that the injury resulted from a determination to injure the employee, and negligence, no matter how gross, of itself will not be sufficient to justify the recovery of the additional amount.⁹⁷

"The plaintiff and other employees of the defendant company, together with a man named Fisher, the foreman, having charge of the work, were engaged in erecting a large sheet-iron tank, to be used for the storage of chemicals. This tank was composed of large iron plates, which were lifted in position by means of a derrick and boom, erected upon a scaffolding placed within this large metal tank. Shortly before the accident occurred, the attention of Fisher, the foreman, was several times directed to the fact that the mast of the derrick was leaning two feet, that one of the guy lines was weak, and several of the men said to him that the mast should be straightened and the guy lines should be tightened and replaced. Fisher refused to do this, and, notwithstanding the fact that his attention was called to the defects of this derrick several times, and that a strain of a ton load was being placed upon the guy lines and the derrick, the foreman, with an oath, directed McWeeny and the other men to proceed with the lifting of the heavy iron plate. They did so, and while engaged in this work the scaffolding and derrick collapsed, injuring McWeeny and several other of the men. The evidence tends to show that the foreman at the time of this unfortunate occurrence was himself in a place which was of no danger to him. From an examination of these sections (20-1 and 21-2) it is apparent that, where an employer had complied with the provisions of this act in paying the premiums into the funds and in posting the necessary notices, the employee in case of injury, or his representative in case of death, can not recover for negligence

96. *Pettee v. Noyes*, 133 Minn. 109, 157 N. W. 995.

97. *Jenkins v. Carman Mfg. Co.*, 79 Ore. 448, 155 Pac. 703, 11 N. C. C. A. 547.

or the want of ordinary care, but if the injury results from a willful act, or from the violation of a statute or ordinance or order of any duly authorized officer, which statute, ordinance, or order was enacted for the protection of the life or safety of the employee, then in such event the employee can either take the benefits provided under this act or sue in court to recover. The defendant contends that the willful act in contemplation of this statute must have been an act done intentionally with a purpose to inflict injury. The court charged at the trial, in part; 'To constitute a willful act in this case, you must find that the action of Fisher was such an action as to evince an utter disregard of consequences so as to inflict the injuries complained of. In other words, the negligent action was such recklessness reaching in degree to utter disregard of consequences which might probably follow. In the action of Fisher in ordering McWeeny to work on this scaffold and in connection with this derrick was done under such circumstances as to evince an utter disregard for the safety of McWeeny and the other employees working there in connection with him, then that action was a willful act.' If the contention urged by defendant that a willful act had to be an act coupled with an intention to injure the employee were the correct construction of those terms of the statute, then the employers of laborers, so long as they themselves or their employees did not criminally injure their employees, could incur no liability no matter how recklessly or carelessly they conducted their business without any regard to the safety of those employed. Extreme cases of this sort will seldom arise. I can not believe that the legislature intended that the term 'willful act' should be narrowed down to mean a deliberate intent to do bodily injury and nothing else. This compensation act was passed for a purpose; its primary purpose was to protect the men engaged in the various occupations in Ohio. In my opinion, the case was fairly tried, and the issues fairly submitted, and the motion for a new trial will be overruled.'⁹⁸

98. *McWeeny v. Standard Boiler Plate Co.*, 210 Fed. 507, 4 N. C. C. A. 919, *Aff.* 218 Fed. 361, 134 C. C. A. 169.

Failure to grind a circular saw, as required by the laws of 1909, page 202, which resulted in injury to employee, was held to be an "intentional omission," within the Ill. Act. of 1911.⁹⁹

An employee was caught under the wheels of a 26-ton crane, and injured as the result of the crane not being guarded as required by statute. He sought to recover 15 per cent extra compensation, in accordance with a provision of the act that, in case the employer fails to comply with the provisions of any statute of the state or order of the industrial commission, and injury results therefrom, compensation will be increased 15 per cent. The front wheels of the trucks were not guarded. The employer sought to defeat the claim on the ground that, even though the front wheels had been guarded the employee would have been crushed against a vertical post 4 or 5 feet distant or else would have been thrown to the ground a distance of 20 feet and probably killed. In affirming a judgment allowing the additional compensation, the court, said: "An injury is caused by the failure of an employer to guard a machine where it appears as a fact that the particular injury from which the employee suffered would not have been sustained by the employee if the machine had been guarded as required by law, and the employer is liable therefor unless it is caused by a want of ordinary care on the part of the employee which is wilful. The chain of physical causation is complete, and whether or not the failure to guard is the proximate cause of the injury in the sense in which that term is used in the law of negligence is immaterial."¹

A finding that the employer was not guilty of such serious and wilful misconduct as would entitle the injured employee to double compensation, when supported by the evidence, is conclusive where an employee sustained a mortal injury consisting of a fracture of the spine with severance of the spinal cord, due to the collapse of a staging which he and other employees were taking down.²

99. *Forrest v. Roper Furniture Co.*, 267 Ill. 331, 108 N. E. 328.

1. *Manitowoc Boiler Works v. Indus. Comm.*, 165 Wis. 592, 163 N. W.

172, 17 N. C. C. A. 436.

2. *In re Burns*, 218 Mass. 8, 105 N. E. 610, 5 N. C. C. A. 635.

“The negligence of the subscriber in furnishing for the use of its employees an elevator so thoroughly out of repair as to be unsafe and in permitting the use of the elevator which the board could find the superintendent considered was in a ‘dangerous condition,’ while abundantly shown by the evidence, * * * does not rise to the degree of serious and wilful misconduct of a subscriber or of any person regularly intrusted with and exercising the powers of superintendence, for which under section 3, as amended, the injured employee shall be awarded double compensation. * * * ’23

When an employee is injured as the result of an act of wilful misconduct on the part of his employer, and institutes an action at law to recover damages, as provided for by the provisions of the California Act in such cases and the court sustained a demurrer to the plaintiff’s petition and judgment was rendered against him, this does not amount to an election of remedies, a determination of which would bar further proceedings under the compensation act. The judgment only determined that the allegations of the complaint failed to state a case that would permit the claimant to institute a cause of action other than a proceeding under the compensation act and therefore the proper tribunal for the adjudication of his claim was the Industrial Accident Commission.⁴

Where an employer is assessed treble damages because of hiring a minor of permit age, without requiring a permit, he cannot avail himself of the defense that the minor willfully misrepresented his age.⁵

In another California case the court said: “Serious misconduct” of an employer must therefore be taken to mean conduct which the employer either knew or ought to have known, if he had turned his head to the matter, to be conduct likely to jeopardize the safety of his employees. It seems clear that according

3. In re Riley, 227 Mass. 55, 116 N. E. 259, 17 N. C. C. A. 434.

4. San Francisco Stevedoring Co. v. Pillsbury, 170 Cal. 321, 9 N. C. C. A. 37, 149 Pac. 586.

5. Mueller & Son Co. v. Gothard, — Wis. —, (1920), 179 N. W. 576, 6 W. C. L. J. 730.

to this test, the commission was amply warranted in finding that the maintenance of the improperly protected shafting, immediately over, and in close proximity to the conveyor belt, was such serious misconduct.⁶

Safety orders of an industrial commission are not effective until served upon the employer. Such safety orders are not conclusively presumed to be reasonable. And it is incumbent upon a servant, suing for personal injuries caused by gross negligence of the employer, to prove that the injuries resulted from conduct of the employer which would amount to gross negligence. A failure to comply with a safety rule of which he had no knowledge would not, of itself sustain claimant's contention.⁷

Under the Kentucky act the failure of an employer to furnish safety devices required by statute does not entitle a guardian or the injured minor employee to sue at common law for damages for this election applies only where the minor is employed in willful and known violation of law, and such failure does not constitute employment in violation of law.⁸

§ 288. **Injuries Sustained While Performing Acts for the Personal Convenience or Pleasure of the Employee.**—A traveling salesman's duties and places to call during a particular week were definitely determined by his employer, and he was furnished with an automobile for this purpose. He departed from the schedule mapped out for him and visited other places during the week in order that he would be able to attend memorial services to be held in this latter locality. While visiting these places he was killed in an automobile accident. The court held that in deviating from the route mapped out, in order that he might gratify his own personal ambitions he took himself out of the course of the employment, so that the accident did not arise out of the employment.⁹

6. *E. Clemens Horst Co. v. Indus. A. C. of Calif.*, — Cal. —, 193 Pac. 105, 7 W. C. L. J. 3.

7. *Schmidt v. Pursell*, — Cal. App. —, (1920) 190 Pac. 846, 6 W. C. L. J. 425.

8. *Freys Guardian v. Gamble Bros.*, — Ky. App., — (1920), 221 S. W. 870, 6 W. C. L. J. 171.

9. *State ex rel. Niessen v. District Court of Ramsey Co.*, 142 Minn. 335, 172 N. W. 133, (1919), 18 N. C. C. A. 1041, 4 W. C. L. J. 109.

Where a street car conductor stopped his car in front of his home to order his lunch, and was killed when so doing by being struck by another car, it was held that such an act on the part of the conductor was incidental to his employment, and that injuries received while so doing arose out of and in the course of his employment.¹⁰

A garage employee whose duty it was to wash automobiles, was called by his foreman to look at an automatic pistol that had been taken from an automobile and placed in a desk in the office sometime prior. As the foreman was passing the pistol over to deceased it was accidentally discharged and deceased was killed. In an action for compensation the court held that since the men were merely gratifying their curiosity concerning the pistol and were doing nothing to further the interests of their employer, the accident did not arise out of the employment. The fact that the foreman had authority over and control of deceased was, under the circumstances, immaterial.¹¹

Claimant's employer owned two buildings, T. & M. Claimant's duties were in T. building, and on a Sunday when he was on duty as a watchman at T. building, he went over to M. building, and there fell into an elevator shaft. The board found that claimant's presence in M. building was purely voluntary and aside from any duties connected with his employment, and therefore the accident did not arise out of the employment. This finding was affirmed on appeal.¹²

Where a boy, when returning from a toilet, left the usual pathway, and went a few feet to ask the time from a fellow employee, and was injured by a bale of cotton, which was being rolled from a cart, it was held that such a departure was not one that would disentitle him to compensation for the injury sustained.¹³

10. *Rainford v. Chicago City Ry. Co.*, 281 Ill. 427, 124 N. E. 643, 5 W. C. L. J. 60.

11. *Culhane v. Economical Garage Co.*, 188 N. Y. App. D. 1, 176 N. Y. S. 508, (1919), 18 N. C. C. A. 1042, 4 W. C. L. J. 276

12. *Borek v. Simon J. Murphy Co.*, 205 Mich. 472, 171 N. W. 470, (1919), 18 N. C. C. A. 1042.

13. *Corlett v. Lancashire & N. Ry. Co.*, 120 L. T. R. 236, 18 N. C. C. A. 1043; *Conyea v. Canadian Northern Ry. Co.*, 5 Western Wkly. Rep. 607, 12 N. C. C. A. 897.

An employee was injured, and his hand was bandaged and turpentine poured on the bandage by an agent of the employer to alleviate the pain. In lighting a cigarette the bandage became ignited and his hand severely burned. The court of Appeals affirmed an award which held that the accident arose out of the employment, because such acts as are necessary to the life, comfort and convenience of a workman while at work, though personal to himself, and not acts of service, were incidental to the service. Continuing the Court said: "Are we to place the use of tobacco in this list of ministrations to the comfort of the employed? Is its use necessarily contemplated in the course of such an employment as that in which Duarte was engaged? The petitioner, in answering these questions in the negative, places great dependence in the argument that tobacco is used to appease a selfcreated appetite and not a natural appetite. The argument does not appeal to us. In an endeavor to determine what indulgence of human beings are responsive to the demands of natural, what to unnatural, appetites, we should be carried to depths of biological and physiological research. Such labor is not necessary. We have the tobacco habit with us, and must deal with it as it is. It will not do to say that mankind would be better for a lack of the weed, even if that statement be true. Tobacco is universally recognized to be a solace to him who uses it, and it may be that such a one, unless he finally shakes off the habit, cannot perform the labors of his life as well without it as with it. In the present war one of the constantly recurring calls upon the public of the world is for tobacco for the comfort of the participants in the conflict. Nor are the books without their cases to the substantial effect that the employer must expect the employed to resort to the use of tobacco as a necessary adjunct to the discharge of his employment." The supreme court adopted the opinion of the court of Appeals, "as a correct statement of the facts and an adequate treatment of the law arising on those facts."¹⁴

14. *Whiting Mead Commercial Co. v. Indus. Acc. Comm.*, 178 Cal. 505, 173 Pac. 1105, 17 N. C. C. A. 958, 2 W. C. L. J. 746; *Dzikowska v. Superior Steel Co.*, 259 Pa. 576, 103 Atl. 351, 16 N. C. C. A. 914, 2 W. C. L. J. 131; *Chuldzinski v. Standard Oil Co. of N. Y.*, 176 App. Div.

An employee was killed as the result of an explosion occurring from dynamite in rubbish, while the employee was watching a scavenger unload the rubbish. The accident occurred while the men, (including deceased) were waiting to begin work at a pier. The court held that this risk was in no way incidental to the employment. The men were gratifying their own curiosity, and therefore the accident did not arise out of the employment.¹⁵

Claimant was injured when she slipped and fell on her way back upstairs, after setting a bottle of tea on the boiler in the basement upon arrival in the morning. Affirming an award in her favor the court said: "If claimant, during working hours, had suspended work to go to a cloakroom to change her clothes, to the washroom to wash up or to use the toilet, and while in such room had been injured, she could, under the authorities, have had an award. * * * In order to be acting in the course of her employment, therefore, it was not necessary that she should have been actually engaged in the work thereof. It was sufficient if she was performing some act upon the premises of her employer which, though directly beneficial to herself, was an ordinary incident of a day of employment."¹⁶

An errand boy was injured and later died as the result of an accident, occurring while he was on an errand. The evidence was conflicting as to whether deceased attempted to board the moving train in connection with which the accident occurred, for his own personal convenience or that he was otherwise injured. The board found that the accident arose out of the employment and the court, on appeal, held that there was sufficient evidence to justify such a finding.¹⁷

87, 162 N. Y. S. 225, 17 N. C. C. A. 267; *Rich v. Iowa Portland Cement Co.*, — Iowa —, 170 N. W. 532, (1919), 18 N. C. C. A. 1032, 3 W. C. L. J. 463.

15. *Buvia v. Oscar Daniels Co.*, 203 Mich. 73, 168 N. W. 1009, 17 N. C. C. A. 960.

16. *Etherton v. Johnstown Knitting Mills Co.*, 184 App. Div. 820, 172 N. Y. S. 724, 17 N. C. C. A. 961, 3 W. C. L. J. 361.

17. *Chicago Packing Co. v. Indus. Bd. of Ill.*, 282 Ill. 497, 118 N. E. 727, 16 N. C. C. A. 916, 1 W. C. L. J. 749.

† A street employee, during the noon hour, engaged in conversation with an engineer of a steam roller and climbed upon the engine to get out of the wet. The engineer started the roller to blow off steam. Upon reaching the crest of a hill he lost control of the machine, and it started to coast downhill, and crashed into a house, crushing deceased to death. The court held that the injury neither arose out of nor in the course of the employment.¹⁸ †

An employee was injured by being crushed between two cars. The evidence was conflicting as to whether claimant was, during the intermission between the loading of cars, picking up briquettes, which was part of his duties, or warming himself from the heat emanating from the hot briquettes in a car next to which he had been lying. The commission awarded compensation on the theory that it was immaterial which conclusion was reached, saying: "The man's duties involved periods of leisure, during which apparently he was expected to kill time as best he might, with no specific direction as to what he should do or where he should wait; the night was cold, and he put off dumping the car until he could warm himself from its heated contents; to say that in so doing he had left the master's employment, was pursuing his own private purposes, and doing something foreign to the work he was employed to do, is illogical to a degree. To protect himself from undue and unnecessary exposure, to the cold was a duty he owed his master as well as himself, and it does not follow that he left his master's employment because he negligently allowed the second car to run into him while he was warming himself."¹⁹

Where an employee was killed while using a lift, which was intended to be used only for goods, in going to an upper floor, the court held that the accident did not arise out of the employment.²⁰

18. In re O'Toole, 229 Mass. 165, 118 N. E. 303, 16 N. C. C. A. 916, 1 W. C. L. J. 620; Parsons v. Somerset, etc., (1916), W. C. & Ins. Rep. 254, 15 N. C. C. A. 264.

19. Northwestern Iron Co. v. Indus. Comm., 160 Wis. 633, 152 N. W. 416, 15 N. C. C. A. 260; Richards v. Indianapolis Abattoir Co., 92 Conn. 272, 102 Atl. 604, 1 W. C. L. J. 311; Malandrino v. S. N. Y. Power & Ry. Corp., — App. Div. —, (1920), 180 N. Y. S. 735, 5 W. C. L. J. 725; In re Sadie M. Miller, 3rd A. R. U. S. C. C. 171.

20. Palmer v. Harrods, Ltd. (1916), W. C. & Ins. Rep. 213, 15 N. C. C. A. 261.

In order to prevent employees from opening windows which were behind tubs of dye the employer nailed the windows down. An employee attempted to open the windows to obtain fresh air, and was injured when the chisel which he was using broke and struck him in the eye. The court denied compensation, holding that an employee, though under the protection of the act when doing something for his personal convenience where the act was not strictly forbidden, is not protected when violating enforced rules in order that he might convenience himself. Therefore the accident in this case did not arise out of the employment.²¹

An employee engaged to watch premises, fell asleep and lost his balance, thereby falling down a chute, sustaining injuries which caused his death. In reversing an award, the court held that deceased was employed to watch the premises, and when he procured a chair and fell asleep he abandoned the very work for which he was hired, and therefore the accident did not arise out of the employment.²²

Where an employee was injured while using a planer, which was not within his line of duty, and at the time he was making something for himself, the court held that the accident did not arise out of the employment.²³

An employee, who was not feeling well, was advised by an employee of the owner of the place where he was installing machinery to take some epsom salts, and told him where it was. By mistake he took barium chloride and died. In reversing an award, which was affirmed by the Appellate Division, the court said: "Assuming that this occurrence constituted an accident under the act and that it arose in the course of decedent's employment, we are entirely unable to see that it 'arose out of his employment.' The findings do not indicate that his illness in any manner resulted

21. *In re Borin*, 227 Mass. 252, 116 N. E. 817, 15 N. C. C. A. 261.

22. *Gifford v. Patterson, Inc.*, 222 N. Y. 4, 117 N. E. 946, Rev'g 165 N. Y. S. 1043, 15 N. C. C. A. 262, 1 W. C. L. J. 434; *Colucci v. Edison Portland Cement Co.*, — N. J. —, (1920), 111 Atl. 4, 6 W. C. L. J. 550; *Wels Paper Co. v. Indus Comm.*, — Ill. —, (1920), 127 N. E. 732, 6 W. C. L. J. 307.

23. *Anderson v. Armstrong & Co., Ltd.*, (1917), W. C. & Ins. Rep. 71, 15 N. C. C. A. 263.

from his employment, or even if it did, that his employer as an incident to condition of such employment had undertaken to supply medical attendance or medicines in ministering to such an illness as this was; it not being of an emergent character. The employer had done nothing to authorize or induce the decedent to take the poison on the supposition that it was something which he needed or which would be beneficial to him. Decedent's illness and his attempt to minister thereto were not ordinary or natural incidents to his employment. On the contrary, it is found that decedent's mistake was the result of his voluntary action, induced by the advice of one who was not even in the employment of his employer, but legally was an utter stranger thereto. It was an employee of the company for which decedent's employer was working who persuaded or advised him to take the medicine, and who guided him to the place where, instead of taking such medicine, he obtained the poison which caused his death. It seems to us that the case is not different than it would have been if the decedent, voluntarily acting upon the advice of a stranger, had visited a physician who injured him by malpractice, or had sought a dispenser of prescriptions who gave him poison instead of helpful medicine, and certainly it could not be said that such an occurrence would have arisen out of his employment within the meaning of the statute.²⁴

Where an employee was injured by being caught in a fan when he was placing a bottle, containing food, for the purpose of heating it, in a pipe, through an opening other than the one the employer had assented to, it was held that the accident did not arise out of the employment.²⁵

✦ Where an employee was permitted to use a horse and cart of his employers to bring his own trunk from the depot, and the horse ran away and injured the employee, it was held that the employee was using the horse as a mere licensee and was not do-

24. *O'Neil v. Carley Heater Co.*, 218 N. Y. 414, L. R. A. 1917A, 349, 113 N. E. 406, 15 N. C. C. A. 263, Rev'g 173 N. Y. App. Div. 922, 157 N. Y. Supp. 1138.

25. *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368, 12 N. C. C. A. 891.

ing anything in the furtherance of his master's employment, therefore the accident did not arise out of and in the course of the employment.²⁶

A laborer in a sawmill was told several times to throw fuel into a furnace on the side away from a revolving saw. He chose to act contrary to instructions and was injured by coming in contact with the saw. It was held that his injury did not arise out of the employment. The court said: "There was a safe place to work and a dangerous place to work at the fuel pile. The respondent, as was his lawful right, commanded the petitioner to work on the safe side of the fuel pile in throwing the wood to the furnace. That then became the sphere of the respondent's employment of the petitioner, and to remove any uncertainty in fixing the sphere of employment between the safe and the unsafe side of the fuel heap, the respondent twice ordered the petitioner to keep away from the vicinity of the saw. When the petitioner went, against the respondent's orders, in close proximity to the saw to throw over fuel to the furnace, it was a new or added peril to which the petitioner, by his own conduct, exposed himself; a peril which his contract of service neither directly nor indirectly involved or obliged him to encounter. It did not belong to, nor was it connected with what the petitioner had to do in fulfilling his contract of service on the safe side of the fuel pile."²⁷

Where a workman, employed to do work by hand, tried to rig up a time saving device by throwing a rope over a revolving shaft, and was injured in so doing, it was held that the accident did not arise out of and in the course of the employment.²⁸

Where a servant drank a poisonous fluid while at work, believing that he was drinking water, the injuries received were held to have arisen out of and in the course of the employment.²⁹

26. *Whitfield v. Lambert*, (1915), W. C. & Ins. Rep. 48, 8 B. W. C. C. 91, 12 N. C. C. A. 905.

27. *Schelf v. Kishpaugh*, 37 N. J. L. J. 173, 9 N. C. C. A. 652.

28. *Plumb v. Cobden Flour Mills Co.*, 6 B. W. C. C. 245, 9 N. C. C. A. 655.

29. *Archibald v. Ott*, 77 W. Va. 448, 87 S. E. 790; *In re Cleo Harold Kidwell*, 3rd A. R. U. S. C. C. 178; *In re Joseph Shinebeck*, 2nd A. R. U. S. C. C. 275.

A railroad employee sought shelter under a box car during a violent rain storm. This was the only available shelter. An engine moved the car and both of claimant's legs were cut off. It had always been customary for employees to seek shelter during a storm and their time went on while doing so. It was held that claimant's act was a necessary incident of his employment, and the mere fact that he was guilty of negligence in going beneath the car did not take him outside of his employment.³⁰

Where an employee was injured while answering a telephone call, it being shown that the employee's duties included answering 'phone calls, it was immaterial that the call happened to be for himself. The accident arose out of and in the course of the employment.³¹

An employee was called from his work to answer a telephone call. In going to the 'phone booth he was injured. Later it developed that the call was not for the employee. The court held that the accident arose out of and in the course of his employment, because when called by his superior officer he might reasonably regard it as a command, and under such circumstances, the risk of going to the telephone was not merely an incident to his employment, but was an inherent and component element of it. The court further said: "When a workman in a factory goes to a telephone which is maintained in the factory to answer a call, from whatever source, it will be presumed that he is performing an act necessary to his comfort and convenience, and that such act is an incident of his employment, where the employer has established no rule to the contrary."³²

Where a cook overexerted himself while removing his effects from a sinking ship, and died of heart disease, hastened by the overexertion, the accident was one arising out of the employment,

30. *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. S. 620; *Piscente v. Delaware, Lackawanna & Western R. Co.*, 7 N. Y. St. D. R. 460; *Franchi v. Delaware, L. & W. Ry.*, 6 N. Y. S. D. R. 399; *Gargano v. Delaware, L. & W. Ry. Co.*, 8 N. Y. S. D. R. 45; *In re Wm. R. Kelley*, 3rd A. R. U. S. C. C. 176.

31. *In re Cox*, 225 Mass. 220, 114 N. E. 281, 15 N. C. C. A. 271.

32. *Holland-St. Louis Sugar Co. v. Shraluka*, 64 Ind. App. —, 116 N. E. 330, 15 N. C. C. A. 272.

since any act which would have been reasonable for any one to do, when leaving a sinking ship, which was his temporary home, was within the scope of his employment.³³

Where a chauffeur, after reaching a destination to which he was directed by his employer to take a passenger, found that the train was late, and continued to drive around the town for the personal convenience of himself and the passenger, and while doing so was murdered by the passenger, who suddenly became insane, it was held that the accident did not arise out of and in the course of the employment.³⁴

Where an employee is injured from drinking water which is furnished by his employer, the injury is due to an accident arising out of and in the course of the employment.³⁵

Where a girl was injured while partaking of refreshments handed to her by her employer while she was standing on an elevated platform near the machine she was operating, it was held that the accident arose out of and in the course of the employment.³⁶

"The employee was at work in a car on a spur track, 8 feet away from the main line of the Boston & Albany Railroad. This spur track was about 4 inches below the main line. For some unexplained reason, he left the car and went upon one of the main tracks of the railroad, where he was struck by an engine and killed. There was no evidence showing it to be any part of his employment to cross the main track, nor was there any evidence tending to show why he was there. The plaintiff is not entitled to recover under this statute unless the injury arose out of and in the course of her husband's employment and, to establish these facts, the burden of proof rests upon her. It is not enough

33. *In re Brightman*, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321, 8 N. C. C. A. 102.

34. *Central Garage v. Industrial Comm.*, 286 Ill. 291, 121 N. E. 587.

35. *Vennen v. New Dells Lbr. Co.*, 161 Wis. 370, 154 N. W. 640, 10 N. C. C. A. 729, L. R. A. 1916A, 273; *McKinnon v. Hutchison*, (1915), W. C. & Ins. Rep. 386, 2 Sc. L. T. 22, 10 N. C. C. A. 732; *In re Fred J. Shurz*, 2nd. A. R. U. S. C. C. 100.

36. *Carinduff v. Gilmore*, (1914), W. C. & Ins. Rep. 247, 48 Ir. L. T. 137, 7 B. W. C. C. 981, 10 N. C. C. A. 348.

to show a state of facts which is equally consistent with no right to compensation as it is with such right; there being no evidence to show that the fatality was caused by her husband's employment or that it occurred while he was engaged therein, she cannot recover."³⁷

Where a helper on a truck was killed when returning from a town where the driver had gone to dissipate after completing his work at the place where his duties brought him, his injuries arose out of the employment, since he was not obliged to abandon the truck and seek other conveyance home simply because the one under whose direction he was working saw fit to go elsewhere and not return immediately upon the completion of the work they were sent to perform.³⁸

Workman injured, while doing what is essential to sanitary conditions or to the comfort and welfare of the employee, when preparing to go home, is within the protection of the act.³⁹

It has been held that where it was the established custom for employees to go to the windows for fresh air, an employee killed while so doing, was killed by an accident arising out of and in the course of the employment.⁴⁰

An employee, who was injured while in a wash room for a purpose personal and necessary to himself, was injured in the course of his employment.⁴¹

Where an employee for his own convenience kept a truck, which he was using, several miles distant from the place he was supposed to keep it, and was injured when going to his place of

37. In re Savage, 222 Mass. 205, 110 N. E. 283, 12 N. C. C. A. 894; Chinock v. Potter & Clark, Ltd., (1916), W. C. & Ins. Rep. 55, 12 N. C. C. A. 896. In re J. J. Johnson, 3rd. A. R. U. S. C. C. 179; In re Maxwell Glaser, 3rd. A. R. U. S. C. C. 179.

38. Hartford Acc. & Indem. Co. v. Durham, — Tex. Civ. App. —, (1920), 222. S. W. 275, 6 W. C. L. J. 395.

39. American Smelting & Ref. Co. v. Cassil, — Neb. —, (1920), 175 N. W. 1021, 5 W. C. L. J. 552.

40. Sparks Milling Co. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 737, 6 W. C. L. J. 299.

41. Steel Sales Corp. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 698, 6 W. C. L. J. 303.

employment over a different road than was contemplated in the contract of employment, his injuries did not arise out of his employment.⁴²

It has been held that injuries to an employee, while using an elevator to leave the place of her employment, during the noon hour for the purpose of obtaining theatre tickets, arose out of and in the course of the employment. The elevator being the one regularly used to reach the department in which the employee was employed.⁴³

A light-house keeper, who was allowed to raise some cattle and provisions on the government reservation for his own convenience, was not injured in the course of his employment when gored by his own bull while doing chores.⁴⁴

It has been held under the Federal Act that injuries sustained by a ranger while taking a bath in a creek after a long trip and when he was compelled to camp out in the performance of his duties, was a compensable injury arising out of his employment.⁴⁵

Where a sick employee left the office to go home and fell over a balustrade compensation was allowed under the Federal Act for his death, but it was based rather on the fact that the balustrade was defective than that the injury arose out of or in the course of the employment.⁴⁶

§ 289. **Miscellaneous Accidents. Occuring Within "War Zone" and in Munition Works, Together With Questions Pertaining to Employees in Military Service, as Affected by Compensation Acts.**—An employee was killed while on an errand for his employer when a bomb exploded near him in the street during an air raid. The court denied compensation on the ground that

42. *United Disposal & Recovery Co. v. Indus. Comm., United Engineering Co. v. Same*, — Ill. —, (1920), 126 N. E. 183, 5 W. C. L. J. 682.

43. *White v. Slattery*, — Mass. —, 127 N. E. 597, 6 W. C. L. J. 323.

44. *In re Chancie Fitzmorris*, 3rd A. R. U. S. C. C. 169.

45. *In re Lewis H. Zach*, 2nd A. R. U. S. C. C. 275.

46. *In re Ernest C. Varela*, 2nd A. R. U. S. C. C. 248.

the risk of being killed by a bomb was common to all who might be at or near the spot where it fell in the street.⁴⁷

An employee was sent on an errand to a warehouse wherein inflammable materials were kept, and while there a bomb struck the building and ignited the contents. Deceased was later found, and his body bore no marks of violence. The County Judge decided that the employment of deceased exposed him to a common danger in a special way; that the inflammable nature of the goods in the warehouse added a special and additional risk; and that from the facts proved it was inferable that deceased died from suffocation, and that the accident arose out of and in the course of the employment. The judgment was affirmed on appeal.⁴⁸

Defendant owned a public house in London. Applicant was engaged as a potman, and was cleaning a brass plate on the street side of the house when he was knocked down by the concussion of an exploding bomb, dropped from an enemy aircraft. The County Court held that he was entitled to compensation, but on appeal it was held that if it had been shown that the risk of being struck by a bomb was incidental to passing through or being in the street, the award could be upheld, but as there was no evidence that the applicant "was injured through a risk specially attendant upon his being on the street as distinguished from his being in any other place," the applicant was not entitled to compensation.⁴⁹

Where an engineer, who took refuge under a truck to avoid injury from shells thrown by enemy warships, which were bombarding the vicinity, went to the engine to open the injector so as to prevent the boiler tubes from being burned, and when returning to the truck was hit by a fragment of a shell, it was held that the accident did not arise out of the employment, since he was not by the nature of his employment exposed to any special

47. *Knyvett v. Wilkinson Bros. Ltd.*, 118 L. T. R. 476, 17 N. C. C. A. 961.

48. *Bird v. Keep*, 118 L. T. R. 633, 17 N. C. C. A. 962.

49. *Allcock v. Rogers*, 62 Sol. J. 421 (1918), *Affg.* (1918), W. C. & Ins. Rep. 80

risk, beyond that to which other persons in the vicinity were exposed.⁵⁰

An engineer was injured when his ship, which was engaged in fishing, struck a mine. The ship had been warned against going near the mine fields. The lower court denied compensation on the theory that an accident caused by an alien enemy was not an accident within the protection of the workmen's compensation act. In reversing the lower court his Lordship said: "What is the duty of an engineer in a fishing smack like this? He has nothing to do with the sailing directions; his duty is primarily to obey the lawful orders and directions of the master or the mate, or whoever may be the representative of the master, and if he is told down in the engine room 'Stop,' 'Full steam ahead,' or what not, he must obey those orders, and there is, if not an express, certainly a plainly implied term of the engagement of the engineer that he must obey the orders of the captain, and not attempt to inquire what instructions the owners have given to the captain."⁵¹

A traveling salesman was killed while traveling from America to England in the interest of his employer. The ship upon which he had taken passage, "The Lusitania" a British ship, was torpedoed by a German submarine within the German war zone, and the salesman lost his life in the sinking of the ship. "The extraordinary risk in the present case," the court said, "arose from the fact that Foley was on an enemy ship in the course of his employment. His employer knew of this risk. If the Lusitania had been lost through a collision, fire or storm at sea, resulting in the death of Foley, it would, under the principle enunciated in all the cases bearing on this subject, be held to have been an accident arising out of his employment. Foley's presence on the ship was connected with the very employment in which he was engaged. The fact that the Lusitania was lost through none of the common perils of the sea, but by an extraordinary peril, does not make the extraordinary peril less a cause of accident

50. *Cooper v. N. E. Ry.*, (1915), W. C. & Ins. Rep. 572, 85 L. J. K. B. 187, 13 N. C. C. A. 1011.

51. *Risdale v. Owners of S. S. Kilmarnock*, (1915), 1 K. B. 503, W. C. & Ins. Rep. 141, 9 N. C. C. A. 716.

arising out of Foley's employment. Both Foley and his employer were chargeable with knowledge of the perils of war upon the high seas. They must be assumed to have known that a belligerent vessel sailing under a belligerent flag carrying contraband of war subjected the vessel to attack by an enemy vessel, and that as a result of such attack, under many contingencies recognized by the law of nations, not only the loss of the vessel attacked, but the loss of lives of those upon her might result. The fact that the attack in this instance was not executed in a way that might have been anticipated, but in a manner said to be contrary to the law of nations, may operate to qualify the degree or nature of the danger and risk to such a peril, but does not eliminate the essential factor in the case that the voyage was one pregnant with risk which the employer must have contemplated, as arising out of and in the course of the employment. * * * In the present case, if the *Lusitania* had struck a mine instead of being torpedoed, resulting in Foley's death, could it be reasonably contended that his death was not due to an accident arising out of his employment? We think not. It may be well that those whose employments require them to travel by land or sea are known by their employers to be subject to the common perils that such traveling incurs. The risk is inherent in the employment itself. The manner in which the accident is brought about is not at all the essence of the matter; the vital question always being: Was the accident connected with the employment? It was, when it arose out of the employment provided it occurred in the course of the employment. Suppose the *Lusitania* had not been torpedoed, but captured, and in transferring the passengers to lifeboats Foley lost his life, or after the passengers had been transferred to lifeboats a storm had arisen sinking the lifeboat in which Foley was, could there be any doubt whatever that Foley would have been considered to have lost his life by an accident arising out of his employment. This is the underlying doctrine of *Zabriskie v. Erie R. Co.*, 86 N. J. L. 266 (7. N. C. C. A. 430n), 92 Atl. 385, L. R. A. 1916A 315 and *Terlecki v. Strauss*, 85 N. J. L. 454 (4. N. C. C. A. 584) 89 Atl. 1023 (aff'd) 86 N. J. L. 708, 92 Atl. 1087." "The present case is clearly distinguishable from the cases referred to

in which compensation was denied, in that it cannot be properly said here that there was any malicious design on the part of the German Naval forces against Foley or any other passenger, and it may safely be assumed that the prime object of the German naval forces was to destroy the enemy's ship, and not the lives of its passengers. It is said that the attack made on the *Lusitania*, from a humane and civilized standpoint, was barbarous and cruel and in violation of the law of nations, and that therefore the act of torpedoing the steamer was not within the contemplation of the employer when the risk of going by such steamer was undertaken by its agent, Foley. We do not think that the lawfulness or unlawfulness of the conduct of the German naval officers affects the matter at all. If the *Lusitania* had been attacked by a German Cruiser, and, instead of surrendering, offered resistance or attempted to run away, and thereupon the German cruiser by a well-directed shot struck the steamer in a vital part, causing her to sink, and Foley to lose his life, it would hardly have been contended by respondent that the death of Foley was not due to an accident arising out of his employment. Foley's employer knew that the former had taken passage on a British ship and that such ship was subject to the risk of capture by the German naval forces, in what manner that might be accomplished was unimportant, so long as the employer was aware of the risk. Whether the ship was destroyed by lawful or unlawful means is immaterial. We think, therefore, that Foley's death was due to an accident while in the course of his employment, and that such accident arose out of his employment." The judgment of the common pleas was reversed and remanded.⁵²

An employee, who was engaged to work on a mine sweeping barge, was drowned when passing over the quay after leaving the barge. It was dark and he fell into a lock adjoining the quay. The lower court held that when he reached the quay he had ceased to be in the employ of the defendants and was not injured in the course of the employment. In allowing an appeal and reversing

52. *Foley v. Home Rubber Co.*, 89 N. J. L. 474, 99 Atl. 624, 13 N. C. C. A. 1014, (1917), Rev'g 39 N. J. L. J. 115, (1916), 13 N. C. C. A. 1012; *Trumbull v. Trumbull Motor Car Co.*, 1 Conn. C. D. 304.

the lower court Pickford, L. J., in passing upon this point, said: "The workman in this case, in order to get to the actual place of work, had to enter and leave premises on which he had no right to be, and no reason for being except by the conditions of his employment, and in crossing them to encounter dangers which he would not have encountered but for that employment. The public had no right to enter those premises by virtue of the general rights, and were not exposed to the dangers which this workman by reason of his employment had to encounter. It seems to me on principle that any accident occurring to him on these premises, to which he was taken only by his employment, and on which he had no right to be but for his employment, was an accident arising out of his employment, and that the relationship of employer and workman did not cease till he left those premises and his position became again that of an ordinary member of the public."⁵³

Compensation was allowed to a workman for blood poisoning, resulting from scratches received while making shells. The court held that the infection was due to an accident arising out of and in the course of the employment.⁵⁴

An employee was injured while going up a stone staircase, and was found lying on the landing of the staircase with his skull fractured. In holding that the accident occurred in the course of the employment, but that it did not arise out of it, the court said: "Why the deceased fell cannot be definitely stated. One of two causes is suggested—namely, either that he became giddy—a possible result of Bright's disease from which he suffered—or that, being a very lame man, he slipped. He may, however, have slipped or missed his footing just as a healthy person might have done. The steps and landing are the steps and landing as used by the public when Olympia was open. The steps are ordinary steps, wide, easy, and in good repair. I must rely on the evidence of Lieut. Palmer, called by the applicant, and find that the light

53. *Longhurst v. John Stewart & Son, Ltd.*, 115 L. T. R. 399, 86 L. J. K. B. 1328, 32 T. L. R. 722, 13 N. C. C. A. 1017.

54. *Burvill v. Vickers Ltd.*, (1915), W. C. & Ins. Rep. 563, 13 N. C. C. A. 1021.

was sufficient, and that the cases placed on the landing neither obscured the light or constituted a danger to persons using the stairs. The deceased was exposed to no particular or special risk in using the stairs, and the accident is attributable to no risk incidental to the employment."⁵⁵

A taxicab driver was shot while driving a fare to a fort. He had been ordered out by his employer at two o'clock in the morning and warned about sentries. While driving at the rate of six miles an hour, he was shot when he failed to hear the challenge of a sentry. In holding that the accident arose out of the employment, the court said: "The taxicab driver, who is likely to be employed, and who is employed, by officers in the neighborhood or a garrison town in time of war to take them to their fort, with the knowledge that everybody has that there will be a sentry outside the entrance through which the driver must proceed before he gets to the fort, may very well be said to run a special risk even on the brightest day at noontide; but a taxicab driver told in the course of his employment to drive an officer to a fort past one or more sentries in the middle of the night, when it is gusty and rainy and he has a noisy engine, is subjected to one risk and one risk above all others arising out of his employment—that of being shot by the sentries."⁵⁶

A soldier, who had been drafted into the army and sent to work with a civilian logging crew was within the protection of the Workmen's Compensation Act.⁵⁷

AGGRAVATION CASES AS AFFECTED BY THE DOCTRINE OF PROXIMATE CAUSE.

§ 290. **Aggravation of Pre-existing Condition.**—Where an employee claimed to have suffered a strain while at work, resulting in a hernia, but the evidence tended to show that such hernia

55. *Harder v. Gains & Sons*, (1916), W. C. & Ins. Rep. 99, 13 N. C. C. A. 1022.

56. *Thorn v. Humm & Co.*, (1915), W. C. & Ins. Rep. 224, 9 N. C. C. A. 716.

57. *Rector v. Cherry Valley Timber Co.*, — Wash. —, (1921), 196 Pac. 653.

might have been produced by a gradual weakening of the membranes brought on by a tubercular condition, the injury cannot, in the absence of clear proof to the contrary, be said to have been caused by an accident arising out of the employment, for the evidence is equally sufficient to establish that the injury was due to a pre-existing diseased condition.⁵⁸

An employee was operating a windlass, and after hauling up a heavy load he was found to be suffering from hemorrhages due to a ruptured aorta. There was no evidence that there was any unusual strain. The court held that the injury was due to an accident arising out of and in the course of the employment, and not to a pre-existing diseased condition, for in the instant case, all the characteristics of an accident were present. The occurrence was sudden, unexpected, and undesigned by the workman. The circumstances were clearly such that the commission was justified in finding that the hemorrhage was due to blood pressure intensified by vigorous muscular exertion. Relating the hemorrhage to physical exertion, rupture of the aorta by force from within was as distinctly traumatic as if the canal had been severed by violent application of a sharp instrument from without. There was no direct evidence of extraordinary exertion suddenly displayed. When last observed before the hemorrhage, the deceased was working in the manner habitual to his employment. The fact remains, however, that an extraordinary and unforeseen thing suddenly and unpremeditatedly occurred, and presence of all the essential attributes of accident cannot be gainsaid. There was ample evidence in the record to justify the finding of the Industrial Commission that the deceased came to his death by accident, and the circuit court therefore properly confirmed the award.⁵⁹

An employee fell and fractured his femur bone, and later an amputation of the leg became necessary. The evidence tended to show that the amputation was necessitated by a pre-existing

58. *McPhee & McGinnity Co. v. Indus. Comm. of Colo.* — Colo. —, (1919), 185 Pac. 268, 5 W. C. L. J. 160.

59. *E. Baggot Co. v. Indus. Comm.*, 290 Ill. 530, 125 N. E. 254, 5 W. C. L. J. 202.

cancer and not by the accidental injury. Compensation was denied, as the loss of the leg was not proximately due to the injury.⁶⁰

An employee, engaged in baling scrap copper was found dead near the baling press, with a completed bale of copper beside him. There was no evidence proving that an accident occurred. The court held that compensation may be awarded, although there was a pre-existing disease, if the disease was aggravated and accelerated by an accidental injury in the course of the employment, but there must be an accidental injury as the immediate or proximate cause of death. In the present case there was no evidence tending to prove any accident or accidental injury to the deceased. Therefore the decision of the board that the death was not due to an accident arising out of the employment was correct.⁶¹

Deceased, a nightwatchman, was discovered the following morning in a state of collapse. He developed pneumonia and after a few days died. It was claimed that his pneumonia was traumatic and that the injury was due to an accident sustained by deceased while alone at the foundry at night. "The defendants deny that the illness and death of Mailman was due to an injury, accidental or otherwise. They argue that when he began work on the evening of April 18th he was 'coming down' with pneumonia. This is disputed. If true, it is not decisive. Evidence that an existing disorder reaches the point of disablement during employment, of course does not prove accidental or other injury arising out of such employment. It is sufficient however (assuming other elements proved), if by weakening resistance or otherwise an accident so influences the progress of an existing disease as to cause death or disablement. *Voorhees v. Smith*, 86 N. J. Law, 500, 92 Atl. 280; *Trodden v. Mc Lennard*, 4 B. W. C. C. 190; *Doughten v. Hickman*, 6 B. W. C. C. 77; *Puritan v. Wolfe* (Ind. App.) 120 N. E. 417. There is some evidence that upon the body of the deceased a mark, or marks were observed which turned

60. *Brady v. Holbrook, Cabot & Rollins Corp.*, 189 App. Div. 405, (1919), 178 N. Y. S. 504, 5 W. C. L. J. 91.

61. *Jakub v. Indus. Comm.*, 288, Ill. 87, 123 N. E. 263, 4 W. C. L. J. 153,

black when blood poisoning set in. There is some medical testimony to the effect that the symptoms were more consistent with traumatic pneumonia than with illness otherwise caused. The spontaneous exclamation of the suffering man, 'I got hurt,' clearly admissible for this purpose, shows that what he sensed and felt was the shock of a hurt rather than the prostration of illness. In view of these circumstances, it cannot be reasonably said that there was no evidence that the illness of the deceased was traumatic. There is evidence that Mailman on the night of the 18th was in good health. He was left performing his duties at the foundry 'laughing and joshing.' The following morning he was found, still at his post of duty, stricken and helpless. The deceased might have left the foundry in the night in pursuit of his own affairs, received an injury, and found his way back. He might have been injured in the foundry while doing something for his own personal pleasure, entirely independent of his employment. These unsupported hypotheses are so improbable as to be almost negligible. From all the circumstances, the commissioner drew the inference that Mailman's injury was received while employed at the defendant's foundry and arose out of such employment. This inference is neither unnatural nor irrational."⁶²

A workman died in the course of his employment from a rupture of the aorta, which was caused by an extra effort in vomiting. The vomiting was due to the inhalation of noxious gases or some similar cause. The court held that the rupture of the aorta was the result of accidental "violence to the physical structure of the body" within the meaning of the Pennsylvania statute, and the fact that deceased was suffering from a diseased physical condition was immaterial when viewed in the light of the following decisions. "While the fact that he suffered from a malady which, in time, might have terminated fatally, called for consideration, it was in no sense controlling. If death comes, during the course of employment, in an ordinary way, natural to the progress of a disease with which one is afflicted,

62. *Mailman v. Record Foundry & Machine Co.*, 118 Me 172, (1919), 106 Atl. 606, 4 W. C. L. J. 205; *Hackley-Phelps-Bonnell Co. v. Indus. Comm.*, — Wis. —, (1920), 179 N. W. 590, 6 W. C. L. J. 724.

and with which he was smitten before the accident, there can be no recovery (*McCauley v. Imperial W. Co.* supra, 261 Pa. 327, 104 Atl. 617; *Lane v. Horn & Hardart Co.*, supra, 261 Pa. 333, 104 Atl. 615); but, if the demise is brought about by an injury due to some mishap, or accident, happening during the course of his employment, the fact that deceased had a chronic ailment which rendered him more susceptible to such injury than an ordinary person would be, will not defeat the right to compensation. *Madden's Case*, 222 Mass. 487, 494, 111 N. E. 379, L. R. A. 1916D, 1000. Certain of the cases cited are governed by statutes which differ somewhat in legislative language from the Pennsylvania Act; but in no instance is this difference of a character to affect the relevancy of the decision, so far as it involves the point now before us.⁶³

An engine fireman fell from a cab, and was found unconscious on the side of an embankment 12 feet high, with certain scalp wounds on the back of his head, and later died from a hemorrhage of the brain and fracture of the skull. It was contented that the hemorrhage was caused by a syphilitic condition from which deceased was suffering. The board found that the syphilitic condition was aggravated under such circumstances which could be said to be accidental, and therefore the death was due to an accident arising out of the employment.⁶⁴

Where an employee was apparently not in good health before the accident, and after the accident was partially incapacitated, the incapacity is proximately due to the accident operating upon his diseased physical condition, and not to his ailment independent of the injury. Therefore his incapacity is proximately caused by the accident arising out of the employment.⁶⁵

Where an ice man was struck in the stomach with a cake of ice, and later developed delirium tremens, because of his alco-

63. *Clark v. Lehigh Valley Coal Co.*, 264 Pa. 529, (1919), 107 Atl. 858, 4 W. C. L. J. 747.

64. *Peoria Railway Terminal Co. v. Indus. Bd. of Ill.*, 279 Ill. 253, 116 N. E. 651, 15 N. C. C. A. 632; *Hanson v. Dickinson*, — Iowa —, (1920), 176 N. W. 823, 5 W. C. L. J. 837.

65. *Big Muddy Coal & Iron Co. v. Indus. Bd.*, 279 Ill. 235, 116 N. E. 662.

holic condition, which existed prior to the accident, the court held that the accident and not the alcoholic condition was the proximate cause of his death.⁶⁶

As a general rule the pre-existing physical condition is immaterial if the injury is proximately caused by an accident arising out of and in the course of the employment. The fact that the accident of itself would not have been sufficient to cause the injury in the absence of a pre-existing disease is no defence, for the employer takes the employee as he finds him, and if the accident accelerates or aggravates a pre-existing diseased condition the injured party is entitled to compensation. While on the other hand an injury due to the natural progress of the disease itself will not warrant a finding that the injuries were due to an accident.⁶⁷

In a recent Louisiana case the court quoted with approval and followed the following rule evolved in the case of *Behan v. John B. Honor Co., Ltd.*, 143 La. 348, 78 So. 589, L. R. A. 1918F. 862:

"The fact that an employee injured in performing service arising out of and incident to his employment in the course of his employer's occupation was already afflicted with a dormant disease that might some day have produced physical disability is no reason why the employee should not be allowed compensation, under the employers' liability statute, for the injury which, added to the disease, superinduced physical disability.

66. *Carroll v. Knickerbocker Ice Co.*, 169 App. Div. 450, 155 N. Y. S. 1; *Heileman Brewing Co. v. Schultz*, 161 Wis. 46, 152 N. W. 446.

67. *In re Brightman*, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321; *Western Electric Co. v. Indus. Bd.* 285 Ill. 279; *Hartz v. Hartford Faience Co.*, 90 Conn. 539, 97 Atl. 1020; *Sulzberger v. Indus. Comm.*, 285 Ill. 223; *Carroll v. What Cheer Stables Co.*, 38 R. I. 421, 96 Atl. 208; *Ismay v. Williamson*, 1 B. W. C. C. 231; *Braforst v. Owners of S. S. Blenheim*, 6 B. W. C. C. 613; *In re Madden*, 220 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000. Cyc. 76; *Clover v. Hughes*, 3 B. W. C. C. 275; *Finkeldav v. Henry Heide, Inc.*, 183 N. Y. S. 912, 6 W. C. L. J. 565, (1920); *Glennon's Case*, — Mass. —, 128 N. E. 942, 7 W. C. L. J. 210; *Rockford City Traction Co. v. Indus. Comm.*, — Ill. —, (1920), 129 N. E. 135, 7 W. C. L. J. 283; *In re Colan*, — Ind. App. —, 116 N. E. 842, A. 1 W. C. L. J. 39; *In re Roy R. Heavrin*, 3rd A. R. U. S. C. C. 154; *In re Wm. C. Frost*, 3rd A. R. U. S. C. C. 162.

"The proof goes no further in support of the defense of this suit than to show that the plaintiff might, and perhaps would, at some time, have become disabled by the disease that was lurking in his system, even if the accident complained of had not happened. The evidence leaves no doubt that the plaintiff's physical disability resulting from the accident is worse than it would be if he had not been diseased at the time of the accident. But the accident was none the less the proximate cause of the present disability."⁶⁸

The subject of aggravation of a pre-existing diseased condition by an accident arising out of and in the course of employment has been treated at length in connection with "Accidents" Chapter V, § 138, ante.

§ 291. **Aggravation of an Injury by Subsequently Intervening Cause.**—Where a Workman suffered an injury in the course of employment, which so impoverished his system as to leave him susceptible to tuberculosis, of which there was not the slightest indication before the injury, a finding that the death was proximately caused by an accident arising out of the employment was affirmed on appeal, the court saying: "Where a workman receives personal injury from an accident arising out of and in the course of his employment, and disease ensues which incapacitates him for work, the incapacity may be the result of the injury within the meaning of the (English) Workmen's Compensation Act, even though it is not the natural result of the injury. The question to be determined on a claim for compensation is whether the incapacity is in fact the result of the injury. *Ystradowen Colliery Co. v. Griffiths*, (1909), 2 K. B. 533. In a case where a petitioner's arm was broken while he was in defendant's employ, and the fracture properly united, but there developed an abscess upon the fleshy part of the thumb, which resulted in ankylosis, making the thumb useless, our Supreme Court held that the ankylosis of the thumb was an injury arising by accident out

68. *Fox v. United Chemical & Organic Products Co.*, — La. —, 86 So. 311, 7 W. O. L. J. 62.

of and in the course of the employment. *Newcomb v. Albertson*, 85 N. J. Law, 435, 89 Atl. 928. And Mr. Justice Swayze, in writing the opinion in *Liondale Bleach Works v. Riker*, 85 N. J. Law, 426, at page 429, 89 Atl. 929, observed that the question of disease following an accident was considered in *Newcomb v. Albertson*, *supra*. The decision there, rested on certain English cases, is to the effect that an injury which follows an accident, and which, but for the accident, would not have happened, justifies the finding that the injury in fact results from the accident.⁶⁹

Where an employee suffered an accidental injury to his hand, and three years later a cancer developed on his penis, which he sought to show resulted because of his impaired physical condition following the injury to his hand, the court held that the evidence adduced was insufficient to establish such a causal connection as to warrant any such finding.⁷⁰

Claimant was injured in a fall and his leg fractured. Later it became necessary to amputate the leg. The evidence tended to show that the claimant was suffering from a cancerous infection at the point where the fracture occurred, and that both the fracture and the amputation was proximately caused by the cancerous conditions, and the accidental fall was merely the occasion and not the cause of the injury. Therefore it cannot be said that the loss of the leg was due to an accident arising out of the employment, but was due to the cancerous disease.⁷¹

Plaintiff in error insists that the death was not due to an accident arising out of and in the course of the employment of the deceased, but was due to an intervening cause. The testimony shows that November 16, 1914, deceased, with others, was engaged in unloading barrels of meats from a car. A barrel weighing

69. *Lundy v. George Brown & Co.*, 93 N. J. L. 107, (1919), 108 Atl. 252, 5 W. C. L. J. 294; *Bethlehem Shipbuilding Corp., Ltd. v. Indus. Comm.*, — Cal. —, (1919), 185 Pac. 179, 5 W. C. L. J. 128; *Tanner v. Aluminum Castings Co.* — Mich. —, (1920), 178 N. W. 6 W. C. L. J. 337.

70. *Ortner v. Zenith Carburetor Co.*, — Mich. —, (1919), 175 N. W. 122, 5 W. C. L. J. 273.

71. *Brady v. Holbrook, Cabot & Rollins Corp.*, 189 App. Div. 405, 178 N. Y. S. 504, (1919), 5 W. C. L. J. 91.

about 500 pounds was pried from its position on top of other barrels, suddenly fell, and rolled, striking deceased, knocking him down and injuring his leg. The proof warrants the conclusion that the abscess which developed and caused deceased's removal to a hospital resulted from that injury. But plaintiff in error contends Bonkowski's death did not result from that injury, but was due to his fall in the hospital, which intervened between the accident received where he was employed and the death. The testimony of the physician who treated Bonkowski was, in substance, that the abscess on his thigh was caused by an external injury; that the pus which had formed had eaten through and destroyed the tissue and blood vessels and attacked the bone, which necessitated curetting and chiseling away part of the bone. This weakened the bone, and while getting out of bed the limb gave away, Bonkowski fell to the floor, and the femur broke at the place it was eaten by disease. He was operated on six days later and died from the shock the same day. The Industrial Commission was warranted by the proof in finding that death resulted from the injury.⁷³

Where a workman's neck was cut while being shaved in a barber shop, and the following day, while handling hides, anthrax germs entered through the cut causing his death, it was held that the death was due to an injury arising out of the employment.⁷³

Where an employee strained himself by lifting, and later died from pneumonia, which the evidence established was due to the injury, the board was justified in finding that the subsequent death was due to an accident arising out of and in the course of the employment.⁷⁴

72. *G. H. Hammond Co. v. Indus. Comm. et al.*, 288 Ill. 262, 123 N. E. 384, 4 W. C. L. J. 176; *Bailey v. Indus. Comm.*, 286 Ill. 623, 122 N. E. 107; *Bergstrom v. Indus. Comm.*, 286 Ill. 29; *In re Patrick J. Mara*, 3rd A. R. U. S. C. C. 104; *In re Joseph Porter*, 3rd A. R. U. S. C. C. 103; *In re Freeman H. M. Murray*, 3rd A. R. U. S. C. C. 104.

73. *Eldridge v. Endicott Johnson & Co.*, 189 App. Div. 53, 177 N. Y. S. 863, (1919), Reversed, see 126 N. E. 254, 5 W. C. L. J. 716.

74. *Folts v. Robertson*, 188 N. Y. 359, (1919), 177 N. Y. Supp. 34, 4 W. C. L. J. 429.

Where an employee suffered an accidental injury and later developed hysterical insanity, a finding of the board that the insanity was due to the injury and arose out of the employment, was sustained by the evidence.⁷⁵

An employee suffered a frostbite while performing his duties in the service of the master and developed erysipelas, as the result of the injury, which caused his death. His death was held to be due to an accidental injury arising out of the employment.⁷⁶

Where a workman stepped on a rusty nail and later contracted tetanus by the entrance of germs through the wound, it was held that he sustained an injury arising out of his employment.⁷⁷

Where a contract of employment provides that the employer will furnish competent medical treatment, and the employee's injury has been aggravated by the furnishing of incompetent medical treatment, it was held that such aggravation did not fall within the compensation act of Alaska, for the injury did not arise out of and in the course of the employment.⁷⁸

Where an employee was injured in the course of his employment, and later aggravated the injury through boxing, it was held that the dormant germs in the locality of the injury had been aggravated by the violent exercise of boxing and the bout, intervening subsequent to the original injury, was the efficient cause, and had its origin independent of the original cause and superceded it, and therefore the aggravated injury was not due to the accident arising out of the employment.⁷⁹

An employee suffered an injury to his leg, and was ordered back to work by the attending physician before the injured member was completely recovered. He struck his leg against a chair with the result that he was further incapacitated. In holding that the

75. *Kingan & Co. v. Ossam*, — Ind. App. —, 121 N. E. 289, 3 W. C. L. J. 276.

76. *Larke v. Hancock Mut. Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320.

77. *Putnam v. Murray*, 174 App. Div. 720, 160 N. Y. S. 811.

78. *Ellamar Min. Co. v. Possus*, (C. C. A.), 247 Fed. 420, 1 W. C. L. J. 723; *Ruth v. Witherspoon-Englar Co.*, 98 Kan. 179, 157 Pac. 403, L. R. A. 1916E, 1201. See *Medical Treatment Causing Disability* § 495 post.

79. *Kill v. Indus. Comm. of Wis.*, 160 Wis. 549, 152 N. W. 148, L. R. A. 1916A, 14.

subsequent injury was proximately caused by the accident arising out of the employment; the court said: "We are of the opinion that a subsequent incident or accident aggravating the original injury may be of such a nature and occur under such circumstances as to make such aggravation the proximate and natural result of the original injury. Whether the subsequent incident or accident is such, or should be regarded as an independent intervening cause is a question of fact for the commission, to be decided in view of all the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld. The testimony of Scott, as to exactly what occurred on the evening of April 15th must be accepted here as true. According to this, there was nothing but the accidental striking by Scott of the heel of the foot of the injured limb against the pedestal of the table or a chair, done in the attempt to save himself from a fall, something to have been reasonably anticipated when he was discharged from the hospital in the condition in which he then was, and all of which happened without any negligence on his part. Surely, if such a thing might cause a displacement of the bones, he was in no condition to be called on to go about without an attendant, and it was reasonably to be anticipated that if he was left thus to care for himself, such a thing would occur. We have already noted the serious nature of the fracture, the length of time required to effect a permanent reunion of the bones, and the extreme difficulty of keeping the bones in place and preventing displacement. Under all the circumstances it appears to us that it might well be concluded, as was concluded by the commission, that such an incident as was described by Scott was not an independent, intervening cause, within the meaning of the law, but that the striking of the heel and consequent separation of the bones, which had been partially, but not permanently, united, was simply a proximate and natural result of the original injury."⁸⁰

80. *Head Drilling Co. v. Indus. Acc. Comm.*, 177 Cal. 194, 170 Pac. 157, 1 W. C. L. J. 470, 16 N. C. C. A. 550; *Reiss v. Northway Motor and Mfg. Co.*, 201 Mich. 90, 166 N. W. 840, 16 N. C. C. A. 550, 1 W. C. L. J. 1008; *Shell Co. of Cal. v. Indus. Acc. Comm.*, 36 Cal. App. 463, 172 Pac. 611, 2

§ 292. Accidents Occuring to Employees While Performing Acts for the Master Other Than Those Within Their Particular

W. C. L. J. 34, 16 N. C. C. A. 552; *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24, 16 N. C. C. A. 554; *Adams v. W. E. Wood & Co.*, 203 Mich. 673, 169 N. W. 845.

In following cases compensation was allowed, in accordance with the general rule, for diseases and disability following accidental injuries arising out of the employment where the subsequent disability was directly traceable to the effects of the injury, or brought on because of an impaired physical condition resulting from the injury rendering the injured party susceptible to the attacks of disease.

Vogele v. Detroit Lbr. Co., 196 Mich. 516, 162 N. W. 975, 15 N. C. C. A. 641; *Leslie v. O'Connor & Richmond*, 220 N. Y. 672, 116 N. E. 1057, 15 N. C. C. A. 642; *Heileman Brg. Co. v. Schultz*, 161 Wis. 46, 152 N. W. 446, 15 N. C. C. A. 643; *Van Keuren v. Dwight Devine & Sons*, 179 N. Y. App. Div. 509, 165 N. Y. S. 1049; *State ex rel. Jefferson v. District Ct. of Ramsey Co.*, 138 Minn. 334, 164 N. W. 1012; *Balzer v. Saginaw Beef Co.*, 199 Mich. 374, 165 N. W. 785, 15 N. C. C. A. 645; *Bucyrus Co. v. Townsend*, 64 Ind. App. —, 117 N. E. 656, 15 N. C. C. A. 646; *Collins v. Brooklyn Union Gas Co.*, 171 N. Y. App. Div. 381, 156 N. Y. S. 957, 15 N. C. C. A. 647; *In re Crowley*, 223 Mass. 288, 15 N. C. C. A. 346, 111 N. E. 786; *Hills v. Oval Wood Dish Co.*, 191 Mich. 411, 158 N. W. 214, 15 N. C. C. A. 649; *In re Sponatski*, 220 Mass. 566, 108 N. E. 466, 8 N. C. C. A. 1025; *Malone v. Cayzer, Irvine & Co.*, 1 B. W. C. C. 27, (1908), S. C. 479, 45 Sc. L. R. 351, 8 N. C. C. A. 1025; *Mutter, Howey & Co. v. Thomson*, (1913), Sc. Ct. of Sess. 6 B. W. C. C. 424; *Southwestern Surty Co. v. Pillsbury*, 172 Cal. 768, 158 Pac. 762; *In re Burns*, 105 N. E. 601, 218 Mass. 8, 5 N. C. C. A. 635; *Cline v. Studebaker Corp.*, 189 Mich. 514, 155 N. W. 519; *Newcomb v. Albertson*, 85 N. J. L. 435, 89 Atl. 928, 4 N. C. C. A. 783; *In re Felecita G. Lynch*, 3rd A. R. U. S. C. C. 121.

In the following cases it was held that the subsequent disability or death was due to intervening causes, and not proximately caused by an accidental injury arising out of the employment.⁵²

Southall v. Cheshire Co. News Co., 5 B. W. C. C. 251, (1912), W. C. R. 101, 8 N. C. C. A. 1028; *McCoy v. Michigan Screw Co.*, 180 Mich. 454, 147 N. W. 527, 5 N. C. C. A. 455; *L. R. A. 1916A*, 323; *Roca v. Stanley Jones & Co.*, (1914), 7 B. W. C. C. 101; *Humber Steam Towing Co. v. Barclay*, (1911), 5 B. W. C. C. 142; *Bellamy v. J. Humphries & Sons*, (1913), 6 B. W. C. C. 53; *Paton v. William Dixon*, 6 B. W. C. C. 882; *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24; *Ruth v. Witherspoon-Englar Co.*, 98 Kans. 179, 157 Pac. 403; *Reiner v. Morris Plains State Hospital*, 37 N. J. L. J. 179; *Lesh v. Illinois Steel Co.*, 163 Wis. 124, 157 N. W. 539.

Line of Duty or Whose Conduct While Performing Their Duties to the Master Places Them Outside the Scope of Their Employment.—A workman who was injured at a buffing machine had been told by his instructor not to reach into an exhaust pipe under any conditions. He dropped an article into the pipe and removed the lid reached into the pipe to recover the article, and his hand was broken and cut by a revolving fan in a box connected with the pipe. In discussing the question whether or not the accident arose out of the employment, the court said: "A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. * * * It may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected therewith. (Byrant v. Fissell, *supra*, on p. 461) It is stated that it may be difficult to conceive of any injury which arises 'out of' the employment which does not arise 'in the course of' it; but the converse, however, is not true. * * * The determination of this question presents one of the most difficult problems in connection with the act. It has been said that each case must depend upon its own circumstances and cannot be solved by reference to any formula or general principle.' (Glass on Workman's Comp. Law, 40). 'An accident only arises out of and in the course of a workmen's employment when it arises from his doing or omitting to do some act within the sphere of his employment. If he chooses to step outside the sphere on his employment and to do something he is not expected or required to do, he does so at his own risk and is not under the protection of the act. * * * A sharp distinction is drawn between doing of a thing recklessly or negligently which a workman is employed to do and the doing of a thing altogether outside and unconnected with what he is employed to do, and if an accident happens in the former case it arises out of and in the course of the employment but not in the latter case. There are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently

will not prevent the recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere. If the act which caused the injury was within the scope of the servant's employment, the mere fact that he had been expressly forbidden to do that act will not necessarily be fatal to his claim. Ordinarily, where workmen are not employed to work with machinery or in close proximity thereto, they are held not entitled to compensation for injuries received where they voluntarily put themselves in a position to be injured thereby. * * * An accident does not arise out of the employment if, at the time, the workman is arrogating to himself duties which he was neither engaged nor entitled to perform. But the courts are inclined not to be too severe upon workmen who are injured by attempts to further the master's business, although the attempt is in a line somewhat outside the precise scope of the employment. Where a servant is employed to do a certain service and is injured in the performance of a different service voluntarily undertaken, the master is not held liable; also where a servant voluntarily and without direction from the master, and without his acquiescence goes into hazardous work outside of his contract of hiring he puts himself beyond the protection of the master's implied undertaking, and if he is injured he must suffer the consequences. A master is not liable for the injuries to his servant unless the servant was at the time in the performance of some duty for which he was employed. (*Stagg v. Edward Westen Tea and Spice Co.*, 169 Mo. 489). A volunteer is one who introduces himself into matters which do not concern him, and does, or undertakes to do, something which he is not bound to do or which is not in pursuance or protection of any interest of the master, and which is undertaken in the absence of any peril requiring him to act as on an emergency. (*Kelly v. Tyra*, 103 Minn. 176, 114 N. W. Rep. 750). The scope of a servant's duties is determined by what he was employed to do and what he actually did with his employer's knowledge and consent, and an employee who was performing the same services he was in the habit of performing when he was injured is not a volunteer in performing such duties. (*Dixon v. Chiquola Manf. Co.*, 86 S. C. 435.). These rules were briefly summed up in

Moore v. Manchester Liners, (1910), A. C. 498, where it was stated an accident to an employee occurs in the course of employment when it takes place 'while he is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing.' The Industrial Board found that the weight of the testimony showed Cappucio had been forbidden to reach into said pipe to recover articles that were dropped. It can hardly be said that the evidence shows that there was any emergency in order to protect the property of the employer that would justify Cappucio in reaching into the exhaust pipe. There is no evidence tending to show that there was any danger from the piece of metal being left in the exhaust pipe. Had the piece fallen upon the floor, there can be no question that it might well be considered as in the line of his duty for Cappucio to have picked it up, as that would ordinarily involve no danger and would be naturally incidental to the work in which he was employed. Of course, it can readily be understood that he desired to have his box complete and all the handles there and not to be criticised because he had lost one; but it is plain from the construction of the exhaust system, in connection with the machinery at which he was working, that he must move with deliberation in order to step around to the large pipe, take off the tightly fitting cover and then reach in some distance,—far enough to bring his hand in contact with the fan. It certainly cannot be said that there was an emergency and that he was acting under a sudden impulse to protect the property of the employer. It is plain from the evidence and from the photograph in the record showing the construction of the machinery and the exhaust pipe, that they were totally distinct; that there was nothing in the construction that would tend in the slightest degree to lead Cappucio to think his work was in any way connected with cleaning the exhaust pipe or taking anything therefrom that had fallen into it, when in doing so he would be required to take off the tightly fitting cover of the pipe in order to reach into the opening. Whether this is true or not, we think the conclusion follows from this record that the act of opening this exhaust pipe to get the piece of metal out had no

such reasonable connection with his work as to justify him in the conclusion that it was his duty to take off this cover and attempt to recover the article. In *Bischoff v. American Car & Foundry Co.*, 190 Mich. 229, 157 N. W. Rep. 34, it was held that 'notice must be taken that a factory of to-day usually includes within the fields of its operations many fairly distinct lines of work, from that of the roustabout engaged in the ordinary labor that almost anyone may perform, to that of the expert mechanic, which can be done safely by those only with skill and experience. The difference between these various kinds of work was always recognized by the common law, and it was held to be negligence for the master to require of the servant, without warning and instructing him in the performance of work outside and more dangerous than that which the latter had contracted to perform. Such classification of work exists in the very nature of things, and as much under the statute as at common law. Its recognition is required by any organization of a factory, not only for efficiency but as well for the purpose of guarding against accident and injury. And if a workman, when there is no emergency, should of his own volition see fit to intermeddle with something entirely outside the work for which he is employed, he ought not to be allowed compensation upon the mere plea that he thought his act would be for the benefit of his employer. That plea may be of value under some circumstances, but it cannot authorize an employee to voluntarily take upon himself the performance of work for which he was not employed.' The reasoning in that case is clearly applicable to the work which Cappuccio was employed to do,— that is the work of polishing was clearly different from the act of putting his hand into the pipe to clean it out or remove an article from it." Therefore the accident did not arise out of the employment.⁸²

A boy who had charge of the handle of a machine lifted off the cover over some pinion wheels and played with them, with the

83. *Eugene Dietzen Co. v. Industrial Bd. of Ill.*, 279 Ill. 11, 116 N. E. 684, 14 N. C. C. A. 125; *Koza's Case*, — Mass. —, (1920), 128 N. E. 406, 6 W. C. L. J. 685; *Henry v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 714, 6 W. C. L. J. 276; *Haas v. Kansas City Light and Power Co.*, — Kan. — 1921, 198 Pac. 174.

result that his hand was caught in the wheels and injured. He had been ordered not to lift the cover or touch the pinion wheels. It was held that the accident did not arise out of the employment.⁸⁴

A boy employed in a spinning mill injured himself while cleaning the machinery while it was in motion. He was not employed to clean the machinery. It was held that the accident did not arise out of the employment.⁸⁵

A lad 14 years of age was employed as a bobbin boy at a spinning mill. His sole duty was to take off the bobbins. He attempted to replace some weights that had fallen off when the machine was in motion and was injured. A man was employed for replacing these weights. It was held that the boy was not acting within the scope of his employment, and therefore the accident did not arise out of the employment.⁸⁶

Where a boy was sent downstairs with an insole to have it remolded, and in the absence of the operator he attempted to remold it himself and was injured in so doing, it was held that, in the absence of instructions forbidding him to touch the machine, he was entitled to compensation.⁸⁷

A chauffeur, engaged in moving bricks from a car by the use of an automobile truck, engaged in a fight with another chauffeur over who should load his car first, and was killed. It was held that deceased was guilty of such gross wilful misconduct in the performance of his master's work as to place himself outside of the employment, and an injury sustained while engaged in the fight did not arise out of the employment.⁸⁸

84. *Furniss v. Gartside & Co.*, (1910), 3 B. W. C. C. 411.

85. *Naylor v. Musgrave Spinning Co.*, 4 B. W. C. C. 286.

86. *Michael v. Henry*, 209 Pa. St. 213, 16 Am. Neg. Rep. 151; *Yodakis v. Alexander Smith Son's Carpet Co.*, 183 N. Y. S. 768, (1920), 6 W. C. L. J. 571.

87. *Tobin v. Hearn*, 33 Ir. L. T. 197; *Greer v. Thompson*, (1912), W. C. & Ins. Rep. 272; *Hartz v. Hartford, Faience Co.*, 90 Conn. 539, 97 Atl. 1020; *In re John F. Cody, Jr.*, 2nd A. R. U. S. C. C. 241.

88. *Stillwagon v. Callon Bros.*, 183 App. Div. 141, 170 N. Y. Supp. 677, 2 W. C. L. J. 379, 16 N. C. C. A. 932; *Central Garage of La Salle v. Indus. Comm.*, 286 Ill. 291, (1919), 121 N. E. 587, 3 W. C. L. J. 428.

A cable splicer's assistant offered to assist the splicer in the performance of his duties, which were not any part of the assistant's duties. The foreman did not object. The assistant was injured doing the work. It was held that, "the voluntary offer of a willing servant to make himself useful in a matter not covered by any express command, when the proffered service is accepted by his superior, although not by an approval expressed in words, cannot be said, as a matter of law, to put the servant outside the limits of his employment."⁸⁹

Where a workman, employed to operate an engine in the basement, goes to an upper floor and volunteers to take fellow employees to a floor above, and is killed in so doing, his conduct took him outside of his employment, therefore the accident did not arise out of the employment.⁹⁰

But where an employee of a contracting company was injured while attempting to save from a cave-in a fellow laborer, working a few feet away on the same general undertaking, but for another employer, it was held that the accident arose out of the employment.⁹¹

Where one employed to operate paint mixers in a factory volunteered to remove a belt, the condition of which did not affect his work, and was injured, it was held that the accident did not arise out of the employment, for where "one introduces himself into matters which he has not been in the habit of doing with his employer's knowledge or consent or which is not in pursuance of any interest of the employer, and which is undertaken in the absence of any peril requiring him to act as on an emergency," he is not acting within the scope of his employment.⁹²

89. *Miner v. Franklin County Telephone Co.*, 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195; *Geary v. Kinzler & Co.*, (1913), 6 B. W. C. C. 72.

90. *Spooner v. Detroit Saturday Night Club*, 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17; *Phillip v. Hamburg-American S. S. Co.*, 37 N. J. L. J. 167; *Pierre v. Barringer*, —La.—, (1921), 88 So. 691; *Waters v. Wm. F. Taylor Co.*, 218 N. Y. 248, 112 N. E. 727; *In re Joseph C. Demereth*, 2nd A. R. U. S. C. C. 276.

91. *Waters v. Wm. J. Taylor Co.*, 218 N. Y. 248, 112 N. E. 727.

92. *Mephram & Co. v. Indus. Comm.*, 289 Ill. 484, 124 N. E. 540, 5 W. C. L. J. 36.

A driver of a street flushing machine allowed another to ride on the truck with him and to drive the truck. The regular driver sat on the other side and operated the levers, and while doing this he noticed a wrench which he thought would fall from the running board, and in stooping to pick it up, he fell off and was injured. The lower court held that the accident arose out of the employment. Affirming the award the court said: "The employee of Tryon & Brain did not abdicate either the place or character of his employment. He gave up part of his work to another, it is true, as he permitted Schiling to run the truck, but it was strictly within the line of his duty to operate and care for the levers which controlled the flow of water from the truck to the street. The same may be said of his attempt to prevent the wrench from falling from the footboard. He was not outside the course of his employment merely because he allowed a stranger to perform a part of his task while he was engaged in the performance of the remainder of it."⁹³

A boy was employed to hoist rivets to workmen on the top of a building. On the day of the accident young Carlson told his fellow worker that he discovered a new way to hoist the rivets, and in pursuance of which he climbed about twenty-five feet up the scaffolding, seized the hoisting rope, to the other end of which a bag of rivets was attached, and jumped to the ground, upon the theory that his weight would counterbalance that of the rivets, and so hoist them to the workmen above. As he reached the ground his head struck the bottom of the scaffolding, he lost hold of the hoisting rope and the bag of rivets fell upon his stomach in such a way as to fatally injure him. "While it may be conceded that Carlson at the time he met with the fatal accident was performing the duties of his employment in an unusual and dangerous manner, this fact, in and of itself alone, does not place him outside the provisions of the Compensation Act (Laws 1919, c. 210). There being a conflict of testimony as to whether or not the boy had been forbidden to leave the ground, the finding of

⁹³. *Employer's Liab. Assur. Corp., Ltd., of London v. Indus. Acc. Comm. of Cal.*, 36 Cal. App. 568, 177 Pac. 171, 17 N. C. C. A. 942. But see *Morris & Co. v. Indus. Comm.*, — Ill. —, 128 N. E. 727, 7 W. C. L. J. 41.

the board is conclusive on the fact that the accident arose out of the employment."⁹⁴

Where an employee, long after customary working hours, discovered a fire on his employer's premises, he was not acting outside the scope of his employment when he attempted, without instructions from his employer, to save his employer's property, and an injury sustained, arose out of the employment.⁹⁵

A laborer went to assist a machinist, who was having trouble in adjusting a belt, and while working under the directions of the machinist he was injured. Assisting the machinist was not any part of the duties of the laborer. In holding that the accident arose out of the employment, the court said: "The words 'arising out of and in the course of the employment' appear to me to be sufficient to include something which occurs while the workman is in his master's employment and on his master's work, although he is doing something in the interest of his master beyond the scope of what he was employed to do. The act does not say 'when doing the work he was employed to perform,' and it is a fair inference that if it had been intended to limit the right to compensation to such accidents different language would have been used from that which occurs in the act. It must be assumed therefor, that the legislature used language of wider scope to include cases where a workman intervenes to do something useful or helpful to his master, although outside the special duties which he is employed to perform."⁹⁶

Where an injury is due to an act of the employee which takes him outside of his duties, but which tends to benefit both himself and his employer, he must show that the act was done with the employer's knowledge and acquiescence.⁹⁷

But if a workman steps outside of his particular duties to do an act which must be done by himself or someone else in behalf of

94. *Indus. Comm. of Colo. v. H. Koppers Co.*, — Colo. —, 1919, 185 Pac. 267, 5 W. C. L. J. 158.

95. *Belle City Malleable Iron Co. v. Rowland*, (1919), 170 Wis. 293, 174 N. W. 899, 5 W. C. L. J. 333.

96. *Menzies v. M'Quibban*, 2F, 732, 37 Sc. L. R. 526, 10 N. C. C. A. 480

97. *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368.

the employer he does not cease to be acting in the course of the employment. Therefore where a stoker attempted to replace a bolt in a fuel conveyor, and was injured while so doing, it was held that the accident arose out of his employment.⁹⁸

A bill clerk of a railroad freighthouse fell into a pit for a scales, which was in process of construction by the railroad. The pit was located along the usual path traversed in going to and from midnight lunch, and when returning from lunch the accident occurred. The court held that the injury was not one "caused by an accident due to a condition or conditions" of his occupation although it may have arisen out of and in the course of the employment, for the injury must have occurred while the employee was at work in his occupation, and it must have been occasioned by a risk or danger inherent in his occupation. In this case the bill clerk was not engaged in such mechanical or physical labor as to be subject to the hazards of the employment.⁹⁹

Where a machinist disobeyed his master's orders to remain in a pit, and as a result he was run over by another racing car while he was running to his master's car to repair it, his act did not place him outside the scope of his employment and preclude a recovery.¹

Where a hospital employee fell down a stairway while in the discharge of his duties, it was contended that because of intoxication the injury did not arise out of the employment. The court held that in the absence of such a degree of intoxication as to completely incapacitate the employee, a finding by the board that intoxication was not the cause of the death, will be sustained.²

98. *McCormick v. A. T. Kelliher Lbr. Co.*, 18 N. C. C. A. 57, 7 B. W. C. C. 1025; *In re Carson Sutton*, 3rd A. R. U. S. C. C. 166; *In re Levi Chance*, 3 A. R. U. S. C. C. 166; *Haver Washed Coal Co. v. Indus. Comm.*, — Ill. —, (1921), 129 N. E. 521.

99. *Arizona Eastern R. Co. v. Mathews*, 20 Ariz. 282, (1919), 180 Pac. 159, 4 W. C. L. J. 3; *Rockford Cabinet Co. v. Indus. Comm.*, — Ill. —, (1920), 129 N. E. 142, 7 W. C. L. J. 281.

1. *Frint Motor Car Co. v. Indus. Comm. of Wis.*, 168 Wis. 436, 170 N. W. 285, 3 W. C. L. J. 399.

2. *Hahnemann Hospital v. Indus. Bd. of Ill.*, 282 Ill. 316, 118 N. E. 767, 1 W. C. L. J. 754.

An employee left his tools in a car and the next day the car was moved. He was told that the car would be back and that then he could get his tools. Some 45 minutes later the yardmaster informed him that the car was approaching in a train which, was moving slowly and he could jump into the car and throw his tools out. He had no orders from anyone in authority. When crossing the tracks he was struck by a suburban train and killed. There was an ordinance forbidding any one to enter the yards. The court affirmed an award, holding that the accident arose out of the employment, as the recovery of the tools was an incident of the work and there was a casual connection between the injury and the employment. The violation of the city ordinance was only prima facie evidence of negligence, and did not affect the recovery of compensation.³

Where a night watchman fell asleep while on duty and fell down a chute, it was held that he had not placed himself without the scope of the employment, and therefore the injury arose out of the employment.⁴

Where a youth upon request climbed out a window upon a marquee for the purpose of rescuing a slipper belonging to a young lady, which she dropped out of the window, the board held that it could not see how an employer, unless gifted with unusual imagination, could for an instant have anticipated that one of his employees would climb out of a window and walk on a glass marquee for the purpose of removing a slipper, when there were other methods of doing it with perfect safety. His action took him outside of his employment, and therefore his injury did not arise out of his employment.⁵

Where an employee was injured while watching a fire, which occurred in his employer's plant, it was held that he had not abandoned his employment, even though his duties did not require

3. *Alexander v. Indus. Board of Ill.*, 281 Ill. 201, 117 N. E. 1040, 15 N. C. C. A. 167.

4. *Gifford v. Patterson*, 222 N. Y. 4, 165 N. Y. S. 1043, B 1 W. C. L. J. 1320, 117 N. E. 946.

5. *Holmes v. United States Printing Co.*, S. D. R. Vol. 12, p. 557; *McGuire v. Brooklyn Heights Ry. Co.*, S. D. R. Vol. 10, page 631, Bull. vol. 2, p. 30, (1916); *In re Nicolo Di Cicco*, 3rd A. R. U. S. C. C. 168.

his presence at the place of the fire, for it is to be reasonably expected that an employee will volunteer his services when the property of his employer is endangered by fire.⁶

A woman employed to clean house once a week was shaking a rug from a porch, in an unusual place, and while leaning against the porch railing she fell to the ground and was seriously injured. It was held that the accident arose out of the employment, even though this was an unusual place in which to clean the rugs, and she had previously performed this work either in the yard or under a covered porch at another part of the house.⁷

A bailiff, acting as a night watchman on a farm, was making a final inspection at night. He attempted to enter the poultry shed, but found that he had left the key locked up in the cow shed. To save himself from going home for the key to the cow shed, he tried to gain entrance by climbing through a window, and in so doing, slipped, fell and was killed. It was held that his conduct was not so unreasonable as to prevent the accident from arising out of the employment.⁸

An employee's duties were to fix and replace light bulbs. The bulbs were locked and the employee had to look up the foreman everytime he wanted the key, which was a simple three cornered contrivance. A fellow employee handed him an empty cartridge shell of unusual length and the thought occurred to him that he could make himself a key and save the time required to look up the foreman every time he needed the key. The shell proved to be a dynamite cap and exploded when he was working on it, and destroyed the vision of his eye. In affirming an award the court said: "The trial court evidently took the view that De Cook in good faith believed he was furthering his master's business and performing an act which he might reasonably be expected to do when he undertook to supply himself with a key. He had never been told that the light bulbs were to be under lock as to him who was charged with the duty of seeing that the broken and defective ones were replaced. When a servant undertakes in the course

6. *Rzepeynski v. Manhattan Brass Co.*, 179 N. Y. App. Div. 952.

7. *Bayon v. Beckley*, 89 Conn. 154, 8 N. C. C. A. 588, 93 Atl. 139.

8. *Pepper v. Sayer*, (1914), 7 B. W. C. C. 616.

of his employment, during the proper hours therefor, and in the proper place, to do something in furtherance of his master's business, and meets with accidental injury therein, the trial court's finding that the accident arose out of and in the course of employment should not be disturbed, unless it is clear to us that the ordinary servant in the same situation, would have no justification for believing that what he undertook to do when injured was within the scope of his implied duties. If another servant duly engaged in the master's work had had his sight destroyed, instead of De Cook in this accident, the thought would have been almost irresistible that this law was meant to cover such injury. But, upon the facts in this case, we doubt whether De Cook should occupy a less favorable position. If the attempt to make a key was reasonably within the scope of his employment, the fact that, from ignorance or error of judgment, he made use of dangerous material, not provided by the master, should not necessarily exclude the conclusion that the injury arose out of the employment. The term can not be restricted to injuries caused from anticipated risks of the service, if the law is to be of the benefit intended."⁹

The janitor of a school house is not engaged in an employment connected with the school building while occupied in trimming trees on the school grounds, and an injury sustained at such occupation does not arise out of or in the course of employment in conduct and management of the school building.¹⁰

An employer was engaged in the business of leasing roadmaking machines and outfits. One of his employees was engaged in repairing a clamshell dredge, which the employer intended to lease, with an option to purchase, and was injured while so engaged. The court held that he was not injured while performing work in the usual course of his employer's business.¹¹

9. State ex rel. Duluth Brewing & Malting Co. v. District Ct., 129 Minn. 423, 151 N. W. 912.

10. Compton v. Indus. Com., 288 Ill. 41, 122 N. E. 872, 4 W. C. L. J. 22.

11. Stansbury v. Indus. Acc. Comm. of Cal., 36 Cal. App. 68, 171 Pac. 698, 1 W. C. L. J. 925, 16 N. C. C. A. 884.

Where a girl, employed to work a hand press, went to a lower floor, and, in the absence of the foreman for whom she was looking, attempted to help another girl, who was operating a power press, and while so doing she was injured, it was held that, in view of the fact that she was not employed to operate a power press, her injury did not arise out of the employment.¹²

A bridge and a boat were provided for use in crossing a stream, which ran between two portions of a farm. A workman, in the absence of the boat and contrary to the advise of his employer, instead of going some distance to the bridge, tried to swim across and was drowned. It was held that his death was not due to an accident arising out of the employment.¹³

An employee was killed when he voluntarily walked upon a railroad track, instead of in a passageway supplied by a railroad company. It was held that the accident did not arise out of the employment.¹⁴

Where a delivery wagon driver stopped to go swimming, after having nearly completed his work, and was drowned, it was held that the accident did not arise out of the employment.¹⁵

Where an employee, when unloading coal, went under the car in the performance of his duty, and was killed, it was held that the accident arose in the course of the employment.¹⁶

Where an employee, while going from a telephone to a room where he was employed, stopped to talk to a fellow employee, and while doing so he reached for an electric lamp and received a shock which caused his death, it was held: "The finding that the fatal injuries received by the employee did not arise out of and in

12. *Brinckman v. Harris*, (1916), W. C. & Ins. Rep. 45, 12 N. C. C. A. 484; *Pritchard v. Torkington*, (1914), 7 B. W. C. C. 719; *Morris v. Muldoon*, (1919), 177 N. Y. S. 673, 4 W. C. L. J. 623; *Adams and Westlake Co. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 168, 6 W. C. L. J. 8.

13. *Guilloule v. Fennessy*, (1912), Irish Court of Appeal, 6 B. W. C. C. 453.

14. *Siemientkowski v. Berwind White Coal Mining Co.*, — (N. J. L.) —, 92 Atl. 909; *Lynch v. Newman*, 37 N. J. L. J. 17; *Smith v. Crescent Belting & Packing Company*, 37 N. J. L. J. 292.

15. *McManus v. R. H. Macy & Co.*, 6 N. Y. St. Dep. 344, 12 N. C. C. A. 82.

16. *Mercer v. Ott*, 78 W. Va. 629, 89 S. E. 952.

the course of his employment must stand, as there was evidence to support it. If, as the board found, the deceased while on his way back to the room where he was employed stopped at the tank to talk with a fellow workman on matters not connected with his employment, and while so engaged leaned on a galvanized iron table and took hold of an electric lamp to enable him to look into the tank, merely for the purpose of satisfying his curiosity, it is plain it properly could not be found that the accident arose out of or in the course of his employment. *Haggard's Case*, 125 N. E. 565; *Savage's Case*, 222 Mass. 205, 110 N. E. 283; *O'Toole's Case*, 229 Mass. 165, 118 N. E. 303; *Warren v. Hedley's Colliery Co., Ltd.* 6 B. W. C. C. 136; *Horsfall v. Steamship Jura*, 6 B. W. C. C. 213.¹⁷

Where a reporter for a newspaper, while enroute to deliver a story he had written, was injured when he stuck his head out of the window of a trolley car to observe the flight of an aeroplane, the court, in holding that the employee was acting within the scope of his employment, said: "If while so engaged he had put his head out of the window caressly or for his own ends, and had been injured, it would have been impossible to have held logically that his injuries arose out of his employment. That would have been a turning away from his employment voluntarily, and not for the purposes of his employment. It would not have been a mere momentary act of negligence, but one which closely approached the statutory characterization, willful and serious misconduct. What the deceased did was not done for the gratification of his personal curiosity, but for the benefit of the *Courant*. He was acquiring information which the deceased deemed of interest to his employer, and this was directly in the line of his duty. At the very time he was hit he was in that dangerous position in order to get information for his paper. The danger to him 'had its origin in a risk connected with the employment,' for it was incidental to it, and indeed a part of it. Between this incident of his employment which brought his head out of the win-

17. *Maronofsky's Case*, — (Mass.) —, (1920), 125 N. E. 565, 5 W. C. L. J. 398; *Haggard's Case*, (1920), — (Mass.) —, 125 N. E. 565, 5 W. C. L. J. 397.

dow and the injury there was a causal connection. The injury occurred within the period of his employment, at a place where he had a right to be, and while he was fulfilling the duties of his employment, and from a risk connected with the employment. *Fiarenzo v. Richards & Co.*, 93 Conn. 581, 107 Atl. 563; *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 308, 309, 97 Atl. 320, L. R. A. 1916E, 584; *Robinson v. State*, 93 Conn. 49, 104 Atl. 491; *Jacquemin v. Turner & Seymour Co.*, 92 Conn. 386, 103 Atl. 115, L. R. A. 1918E, 496. We do not agree with the plaintiff's counsel that the deceased's injuries arose out of an ordinary street accident commonly incident to travel by trolley, and that the cases, headed by *Dennis v. White & Co.*, (1917), A. C. 479, are controlling. Leaning one's head so far out of the car window as to be hit by a trolley car on a parallel track is not an ordinary street accident, but an extraordinary one."¹⁸

Where a mining company's superintendent directed its safety engineer to assist in caring for the company's influenza patients, his services were without the usual scope of his employment but within the actual scope of his employment and injuries suffered therein entitled the engineer to compensation.¹⁹

Where an employee, whose regular employment was hazardous, went to a police station at the direction of his employer, to ascertain whether bail offered for a customer, arrested in the employer's adjoining saloon, was satisfactory, and while there sustained a broken leg as the result of a push by a policeman, his injury was not caused by an accident arising out of and in the course of the hazardous employment, in which he was regularly engaged.²⁰

Where a miner left his regular duties and went to another section of the mine into an abandoned opening, where his duties did not call him, and while there caused an explosion of gas, his

18. *Kinsman v. Hartford Courant Co.*, — Conn. —, (1919), 108 Atl. 562, 5 W. C. L. J. 361; *E. E. Walsh Teaming Co. v. Indus. Comm.*, — Ill. —, 125 N. E. 331, 5 W. C. L. J. 377,

19. *Engles Copper Mng. Co., v. Indus. A. C. of Calif.*, —, Cal.—, 192 Pac. 845, 6 W. C. L. J. 624.

20. *Sabatell v. De Robertis*, 183 N. Y. S. 796, (1920), 6 W. C. L. J. 573.

death was not due to an accident in the course of his employment.²¹

Where an employee departed from the scope of his employment in violation of orders, and as a direct result thereof was accidentally crushed to death, it was held that his death was not caused by an injury arising out of and in the course of the employment.²²

The court in holding that an accident did not arise out of the employment said: "Defendant was an employer and was under the Compensation Act and was engaged in the conduct of his business. Plaintiff and his employer were likewise under the Compensation Act. Plaintiff was driving an automobile belonging to his employer. The automobile had been assigned to another employee of the same employer, but doing business in other territory, and was being taken by plaintiff from a railroad station at the request of this fellow employee and solely as an accommodation to him. The evidence sustains a finding that the accident did not arise in the course of plaintiff's employment and that the case is not within the third party provision of the Minnesota Compensation Act."²³

One employed as a janitor had departed from his employment when he undertook to prune trees in his employer's yard and was engaged in horticultural pursuits which are excluded from the benefits of the California Act.²⁴

One injured while violating a rule which has never been enforced is not without the scope of his employment and is entitled to compensation.²⁵

Where an employer acquiesces in the exchange of work among

21. *Kuca v. Lehigh Valley Coal Co.*, — Pa. —, (1920), 110 Atl. 731, 6 W. C. L. J. 499.

22. *West Side Coal & Mining Co. v. Indus. Comm.*, — Ill. —, (1920), 126 N. E. 218, 5 W. C. L. J. 686; *Fournier's Case*, — Me. —, (1921), 113 Atl. 270.

23. *Gibbs v. Almstrom*, — Minn. —, (1920), 176 N. W. 173, 5 W. C. L. J. 541.

24. *Kramer v. Indus. Comm.*, — Cal. App. —, 161 Pac. 278, A. 1 W. C. L. J. 235.

25. *Sesser Coal Co. v. Indus. Comm.*, — Ill. —, (1921), 129 N. E. 536.

his employees, one injured while exchanging work with a fellow employee was injured in the course of his employment.²⁶

A janitor was not acting within the scope of his employment when he was putting chains on the wheels of a pleasure car owned by an executive officer, who was taking a pleasure ride on Sunday, nor can he recover on the theory of a contract of employment with the executive officer where he had received for such personal services gratuities to the amount of \$50 per year.²⁷

Where a lighthouse keeper was killed while blasting upon a road which lead to the government reservation in order that travel by teams in reaching the reservation would be facilitated, it was held that he had not departed from the scope of his employment.²⁸

Where an employee left his place of work and went to another portion of the premises to sleep and was injured, it was held that he had departed from the scope of his employment.²⁹

An employee who was accidentally shot when he stopped to talk to another employee while on an errand, was held to be entitled to compensation under the Federal Act.³⁰

Where a helper on a truck was killed when returning from a town where the driver had gone to dissipate after completing his work at the place where his duties brought him, his injuries arose out of the employment since he was not obliged to abandon the truck and seeks other conveyance home simply because the one under whose direction he was working saw fit to go elsewhere and not return immediately upon the completion of the work they were sent to perform.³¹

A traveling salesman had not departed from his employment while performing little acts of courtesy for his prospective cus-

26. *Sunny Side Coal Co. v. Indus. Comm.*, — Ill. —, (1920), 126 N. E. 196, 5 W. C. L. J. 679.

27. *Gibbs v. Downs*, — Conn. —, (1920), 109 Atl. 170, 5 W. C. L. J. 777, *In re James R. Mauck*, 2nd A. R. U. S. C. C. 276.

28. *In re James E. Hall*, 2nd A. R. U. S. C. C. 251.

29. *Collucci v. Edison Portland Cement Co.*, — N. J. —, (1920), 111 Atl. 4, 6 W. C. L. J. 550.

30. *In re Wm. W. Richardson*, 3rd A. R. U. S. C. C. 179.

31. *Hartford Acc. & Indem. Co. v. Durham*, — Tex. Civ. App. —, (1920), 222 S. W. 275, 6 W. C. L. J. 395.

tomers where the contract of employment contemplated that he should be courteous and obliging even to an extent which would result in acts not directly connected with the sale of his commodities.³²

ASSAULTS.

§ 293. **Assaults Resulting From Controversies Connected With or Pertaining to the Employment.**—A steamfitter in a factory was called to repair a leaky pipe, and a controversy arose between him and a fellow employee concerning the work. The court held that the main question at issue was whether the accident arose out of and in the course of the employment, and the burden of proving that it did so arise rested upon the applicant, but that proof might be by circumstantial as well as direct evidence. "We think there is evidence in the record that justified the Industrial Board in finding that the altercation grew out of matters connected with Blum's work, and that therefore the accident arose out of and in the course of his employment, and that the altercation was not purely a personal one, entirely outside of the scope of such employment. The fact that Blum was not actually doing the special work of repairing when he was injured does not alter the case. He was where he was expected to be preparatory to fixing the leak."³³

Decedent, a watchman in a boiler factory, while in the performance of his duties, was killed by burglars. Defendants contended that the accident did not arise out of the employment since the hazard was not one which inhered in or was peculiarly incident to the operation of a boiler manufacturing plant. Answering this contention, the court said: "A fair statement of the rule under the rather limited statute of this state is that the injury must result from some danger peculiar to the hazardous character of the employment. This does not mean, however, that in a

32. Chase v. Emery Mfg. Co., — Pa. —, (1921), 113 Atl. 840.

33. Swift & Co. v. Indus. Comm., 287 Ill. 564, 122 N. E. 796, (1919), 18 N. C. C. A. 1048, 4 W. C. L. J. 35; Muller v. Klingman, —Ind. App.—, 125 N. E. 464, 5 W. C. L. J. 384.

factory classified as extrahazardous because of the use of dangerous machinery none but machine operators or employees working in proximity to machinery may have compensation. Regarding for the moment the operating of machinery as the acme of the employment, all that combines to make it such, everything integrated with it essential to effective functioning, other conditions being fulfilled, is included in the hazard. * * * It is stated that in the present case the watchman was killed in the factory. There is no contention that a night watchman was not necessary to the security of the plant, and so to the maintenance and prosecution of the defendant's business.'²⁴

A head waiter was shot by an employee whom he had discharged. The duties of the headwaiter included the hiring, supervision and control of the employee under him. On the morning of the shooting the employee refused to obey the orders of the headwaiter and was discharged. About 11 o'clock he returned and shot the headwaiter. In affirming an award, the court said: "We are of opinion that so long as the employee while in the performance of the employer's business properly exercises the authority conferred upon him by his contract of employment, injuries received by him resulting from such employment arise out of the employment, and if death ensues as in the case at bar his dependents are entitled to compensation."²⁵

Deceased, who was a waiter in a cabaret, was shot when he attempted to interfere in a quarrel between a patron and another waiter. Upon the evidence that the employees were expected to interfere in such quarrels, with the intention of suppressing them, and that this particular cabaret was of a type where such brawls were likely to occur, the court held that deceased was acting within the course of his employment, and the employment being of such nature as to expose him to these extra hazards the accident

24. *Smith v. Kaw Boiler Works Co.*, — Kan. —, 180 Pac. 259, 4 W. C. L. J. 87, 18 N. C. C. A. 1049; *Hellman v. Manning Sand Paper Co.*, 176 N. Y. App. Div. 127, 162 N. Y. S. 335, 14 N. C. C. A. 237; *In re Paul Waltermire*, 3rd A. R. U. S. C. C. 178.

25. *Cranney's Case*, 232 Mass. 149, 122 N. E. 266, (1919), 18 N. C. C. A. 1050, 3 W. C. L. J. 641; *Stertz v. Industrial Insurance Comm.*, 91 Wash. 588, 158 Pac. 256, 14 N. C. C. A. 231.

arose out of the employment, since it could not be inferred that in advancing towards the quarreling parties that deceased intended to start a quarrel; for it was already started. Deceased's intention must have been to stop it as his duty required. The court saying that this "seems from the uncontradicted evidence to admit of little doubt and less speculation."³⁶

Where an assistant cutter in a shirt waist factory was fatally wounded by strikers while trying to save his employer and other employees from injury, the injury arose "out of and in the course of the employment." The court said: "While there must be some causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected. It must, however, be one which, after the event, may be seen to have had its origin in the nature of the employment. Such was our holding in *Pekin Cooperage Co. v. Industrial Com.*, 285 Ill. 31, 120 N. E. 530. Where a workman voluntarily performs an act during an emergency, which he has reason to believe is in the interest of his employer, and is injured thereby, he is not acting beyond the scope of his employment."³⁷

A boiler washer's helper quit and the boiler washer applied to the foreman for another assistant. This angered the first helper, who in an ensuing quarrel shot the boiler washer. It was held that the accident arose out of the employment, the court saying: "There was a causal connection between the conditions under which Kraujalis was required to perform his work and the injury. It cannot be said that the proof does not tend to show that the shooting of Kraujalis was caused by his report to the foreman that Hunt had quit work. This the nature of his work required him to do, as he was obliged to ask the foreman for another helper. He was acting entirely in the line of his duties, and this brought upon him the murderous assault by Hunt with a gun. That such is an unusual and extraordinary result makes it none the less an

36. *Stevens v. Indus. Acc. Comm. of Cal.* 179 Cal. 592, 178 Pac. 296, (1919), 18 N. C. C. A. 1052, 3 W. C. L. J. 572; *San Bernardino County v. Indus. Acc. Comm. of Cal.*, 35 Cal. App. 33, 169 Pac. 255, 15 N. C. C. A. 292.

37. *Baum v. Indus. Comm.*, 288 Ill. 516, 123 N. E. 625, 4 W. C. L. J. 357, 18 N. C. C. A. 1053.

incident of the employment. There is no dispute that Kraujalis was shot in the course of his employment, and we cannot say the Industrial Commission and the Circuit Court erred in finding the injury arose out of the employment, and this conclusion is sustained, in principle, by *Trim School District v. Kelly*, 7 B. W. C. C. 274, where the teacher was assaulted and killed by bad and unruly pupils. *Polar Ice and Fuel Co. v. Mulray* (Ind. App.), 119 N. E. 149; *In re Heitz*, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344.³⁸

A collector for a brewery, while on his rounds of collection, was shot by robbers. Affirming an award in claimant's favor, the court said: "The fact that the death of Spang was intentionally caused does not defeat the claim. He was killed as an incident of his employment, because he had in his possession money belonging to his employer, which it was the purpose of his slayer to feloniously appropriate. An injury caused deliberately and willfully by a third party may be an 'accidental injury' within the meaning of the act, from the viewpoint of the employer and employee."³⁹

Claimant's husband and another were unloading bricks, and they got into a dispute as to which was entitled to load first, and in a quarrel that ensued claimant's husband was killed. In reversing an award, the court held that the injury was not a natural incident to the work deceased was engaged in, and in participating in a fight he took himself outside of his employment.⁴⁰

Where claimant, culling barrel staves for a barrel raiser, was assaulted by an employee, who was culling staves for another barrel raiser, because of a dispute in regard to one taking staves from the rack of the other, he suffered an "accidental injury in the course of his employment" and one arising out of the employment, the court saying: "No fixed rule to determine what is a risk of the employment has been established. Where men are

38. *Chicago R. I. & P. Ry. Co. v. Indus. Comm.*, 288 Ill. 126 123 N. E. 278, (1919), 4 W. C. L. J. 159, 18 N. C. C. A. 1054.

39. *Spang v. Broadway Brewing & Malting Co.*, 182 N. Y. App. Div. 443, 169 N. Y. S. 574, 17 N. C. C. A. 787, 1 W. C. L. J. 1133.

40. *Stillwagon v. Callan Bros.*, 170 N. Y. 677, 121 N. E. 893, 16 N. C. C. A. 932, 2 W. C. L. J. 379; *Knocks v. Metal Package Corp.*, — N. Y. App. Div. —, 185 N. Y. S. 309, 7 W. C. L. J. 350.

working together at the same work disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmary of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment. The origin of this difficulty was trifling—the taking of a few staves from the claimant's rack, to which he objected, saying, as he testified, that if Miller would stay in there he would be up with the claimant. The dispute was concerning the employer's work in which the men were both engaged, and there is evidence tending to show that claimant was not responsible for the assault."⁴¹

Two employees engaged in a fight as the result of an altercation concerning the use of certain ladles and one was killed. The fight occurred in the course of the employment but did not originate in it or arise as a consequence or incident of it. These men turned temporarily from their work to engage in their own quarrel. Nothing their employer required of them would necessarily provoke them to quarrel, nor could this have been reasonably anticipated. The fact that employees sometimes quarrel and fight while at work does not make the injury which may result one which arises out of their employment. There must be some reasonable connection between the injury suffered and the employment or the conditions under which it is pursued.⁴²

Deceased was employed to check up ice shortages on drivers and to report such shortages to the bookkeeper. Having reported one driver of shortage an altercation followed and deceased was shot, while seated at his desk, by the employee whom he had reported. Affirming an award in claimant's favor, the court said: "The facts

41. *Pekin Cooperage Co. v. Indus. Comm.*, 285 Ill. 31, 120 N. E. 530, 17 N. C. C. A. 962, 3 W. C. L. J. 26; *Heitz v. Ruppert* 218 N. Y. 148, L. R. A. 1917A, 482, 112 N. E. 750, 14 N. C. C. A. 226; *Stasmos v. Indus. Comm.*, — Okla. —, (1921), 195 Pac. 762.

42. *Jacquemin v. Turner and Seymour Mfg. Co.*, 92 Conn. 382, 103 Atl. 115 16 N. C. C. A. 930, 1 W. C. L. J. 934.

here show that decedent was performing a character of service for his employer which might any time cause some grievance against him on the part of the other employees with whom his duties required him to come in daily contact, so that when they were so angered at him or when under the influence of liquor they were liable to do him harm, still he was required to remain at his place of employment, surrounded by these dangers which finally led to and produced his death. Under such circumstances it may very properly be said that the accident which did occur was a risk reasonably incident to decedent's employment."⁴³

"An employee of a manufacturing company that had paid its premiums in the workmen's compensation fund, was ordered by a superior to procure an implement, which was to be used by P. to assist such superior. The implement was located in the hands of another employee who had equal rights with P. to its possession. Request for possession was refused. An argument was had by the parties. No effort to obtain possession by violence was made by P., nor was there any conduct justifying any assault by the other employee. Thereupon P. was violently assaulted by such other employee, and died from the effects of the assault. It was held that P. was injured in the course of his employment."⁴⁴

Deceased was an employee in the service of a mining company and was also a deputy sheriff. He was employed by the mining company, among other things, to keep order about its premises and was killed while quelling a disturbance in one of its shacks. His employer sought to evade liability on the strength of a statute which defined the term "employee" and excludes "any person holding an appointment as deputy clerk, deputy sheriff, etc., but receives no compensation from the county or municipal corporation, or the citizens thereof for the services of such duty." The section however provides: "That such last exclusion shall not deprive any person so deputed from recourse, against any private person employing him, for injury occurring in the course of and arising

43. *Polar Ice and Fuel Co. v. Mulray*, — (Ind. App.) —, 119 N. E. 149, 16 N. C. C. A. 933, 1 W. C. L. J. 965.

44. *Indus. Comm. of Ohio v. Pora*, — Ohio —, 125 N. W. 662, 5 W. C. L. J. 580.

out of such employment." "It is obviously to this class of deputies that the excluding clause of the statute refers in sharp contrast to the provisions of the including clause. It is in the light of the meaning of the excluding clause that the proviso in question must be read. So read, its clear effect is to provide that, where a deputy performs acts which, while official in their nature, are advantageous to the employer and directed by him, not incidentally merely, but as part of the duties, prescribed and contemplated in the contract of employment, then such deputy is acting in the course of his private employment within the meaning of the provisions of the Workmen's Compensation Act. Upon this view of the statute, petitioner cannot escape liability to compensate the widow for the death of Franklin H. Smith on the plea that in performing the duties incident to his employment he was also fulfilling a duty to the county."⁴⁵

A mill superintendent, was shot by a trespasser when following express instructions of a superior in ordering the trespasser out of the mill. It was held that he was injured by an accident arising out of and in the course of the employment.⁴⁶

Where a night watchman, employed to keep mauraunders away, was found dead, and his pistol, from which a shot was fired, was found under a plank some 60 feet away, the court held that the board was justified in holding that deceased come to his death by the act of some maurauder who killed him because he was a watchman, not because of a personal grudge, and therefore the accident arose out of and in the course of the employment.⁴⁷

45. *Engels Copper Mining Co. v. Indus. Acc. Comm.*, — (Cal.) —, (1919), 185 Pac. 182, 5 W. C. L. J. 134.

46. *In re Reithel*, 222 Mass. 163, 109 N. E. 951, 11 N. C. C. A. 235; *Nevich v. Delaware, H. W. R. Co.*, 90 N. J. L. 228, 100 Atl. 234, 14 N. C. C. A. 232; *Munroe v. Williams*, Conn.—, 109 Atl. 129, 5 W. C. L. J. 655.

47. *Mechanics Furniture Co. v. Indus. Bd. of Ill.*, 281 Ill. 530, 117 N. E. 986, 15 N. C. C. A. 292; *Chicago Dry Kiln Co. v. Indus. Bd of Ill.*, 276 Ill. 556, 114 N. E. 1009, 14 N. C. C. A. 240; *Ohio Building Safety Vault Co. v. Indus. Bd. of Ill.*, 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224; *Western Grain and Sugar Products Co. v. Pillsbury*, 173 Cal. 135, 159 Pac. 423, 14 N. C. C. A. 236.

A miner, who returned to the mine to ascertain whether all the blasts set had exploded, was shot without any notice while leaving the mine by a guard of the mine. In affirming an award, the court said: "Upon neither of these grounds can this award be annulled. The recognized custom of miner's carried out with the knowledge and approval of the mine owners (a custom which manifestly makes for the protection of the mine owners themselves, in lessening the liability of injury from unexploded blasts by the oncoming new shift, ignorant of the conditions), becomes in all essentials for this award a part of the duty of the miner in the performance of his work, and his injuries thus resulting grew out of and occurred in the course of his employment. Upon the second proposition, while unquestionably it was a heedless and reckless thing for the guards thus to have shot a man without more investigation as to his character and intentions than was here shown to have taken place, yet, every legal presumption favoring innocence, the argument will not be sustained that these guards deliberately perpetrated an assault to commit murder. To the contrary, it will be held that the man who fired the shot, himself the chief guard, believed that the circumstances justified him in so doing, and that thus he was acting within the line of his own employment, and under this view Mason, having been injured by the negligent performance of an act within the general scope of the duties of the employee inflicting the injury, is entitled to his recovery."⁴⁸

An employee began a controversy concerning the failure of another employee to reline ladles, and as a result he was injured. It was not any part of the injured employee's duties to see about the relining of the ladles, he should have reported it to the employer. The court said: "If the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person, familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the

48. *Atolia Min Co. v. Indus. Acc. Com.*, 175 Cal. 691, 167 Pac. 148, 15 N. C. C. A. 238.

workman would have been equally exposed apart from the employment. The causative danger * * * must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." It was held that the injury did not arise "out of" the employment.⁴⁹

An employee was injured when he was struck by a stone thrown by another boy, who was also engaged in throwing stones from coal as it passed by on a belt, and oftentimes the stones were thrown for the purpose of attracting the attention of the other employees. The county judge found that the stone was mischievously thrown, and that it did not matter whether it was aimed at the injured boy or not. It was also found that the hazard of being struck by a stone was peculiar to this employment, and that the accident arose out of the employment.⁵⁰

"During the month of July, 1915, Tibbs was employed by Anseth as a bartender in the latter's saloon in International Falls. In the course of his employment, and while actually engaged in his duties as bartender in the saloon, he was struck in the right eye by a heavy drinking glass thrown by a patron of the saloon who was so drunk that he did not know the nature of the act or what he was doing. It was a contention of relator on the trial that the glass was thrown by Dubonis, the drunken man, in a personal altercation between him and the bartender, but the finding is against this view, and the evidence is such that we must accept as true the version of the matter adopted by the trial court." In holding that the accident arose "out of" the employment, and that the employment necessarily accentuated the natural hazard from assault to which all men are subject, the court said; it "will take judicial notice that the position of bartender, patron, or spectator in a saloon, especially in one situated where

49. *Union Sanitary Mfg. Co. v. Davis*, 63 Ind. App. 548, 115 N. E. 676, 14 N. C. C. A. 227.

50. *Clayton v. Hardwick Colliery Co., Ltd.*, 85 L. J. K. B. 292, (1915), 11 N. C. C. A. 236, Rev'g 1914 W. C. & Ins. Rep. 343, 8 N. C. C. A. 287.

rough characters are apt to congregate and carouse, is quite apt to be one of peculiar danger. Barroom assaults are not of infrequent occurrence."⁵¹

Deceased was engaged in performing the duties of a night marshal in a village and was killed while trying to prevent a violation of the speed laws. It was contended that because deceased was killed while enforcing a municipal ordinance he did not come within the term police officer as construed under the Workmen's Compensation Act. "It is considered that Voeck, as we have shown, was in fact rendering services under an authorized appointment of the village within the power conferred by statute upon the marshal, that he acted in the capacity of a temporary policeman for the village by authority of law, and that the deceased was performing policeman's service within the contemplation of the workmen's compensation act."⁵²

An employee, who had been engaged to work in the place of two Italians was struck with a shovel by the Italians, while he was at work, because of an ill feeling engendered by the exchange of men. The commission held that the assault was an incident of the work, and, under the circumstances, might have been reasonably anticipated, and therefore arose out of the employment. On appeal this finding was affirmed.⁵³

A yard foreman, whose duties were to look after the taking on of extra men and the sending out of vans, was killed by an extra man whom he had promised a van on a certain day, but who arrived too late to get the van that day. There was evidence that one employed to look after these extra men, who were a rough lot, was exposed to the extra hazard of being assaulted. Upon this showing it was held that the accident arose out of the employment.⁵⁴

51. *State v. District Court of Koochiching Co.*, 134 Minn. 16, 158 N. W. 713, 14 N. C. A. 242.

52. *Village of Kiel v. Indus. Comm. of Wis.*, 163 Wis. 441, 158 N. W. 68.

53. *Harnett v. Thos. J. Stein Co.*, 169 App. Div. 905. Appeal to the Court of Appeals dismissed 216 N. Y. 101, 11 N. C. C. 238, 110 N. E. 170.

54. *Weekes v. Wm. Stead, Ltd.*, (1914), W. C. & Ins. Rep. 434, 6 N. C. C. A. 1010.

Where a teacher in a district school was beaten as the result of a criminal conspiracy among the students, it was held that the accident arose out of the employment.⁵⁵

Where a cashier, traveling on a train carrying a pay roll, was murdered, and robbed of the money he was taking to mines to pay off the workmen, it was held that the nature of his employment exposed him to this particular risk, and therefore the accident arose out of the employment.⁵⁶

Where a gamekeeper was beaten by poachers, it was held that the accident arose out of the employment.⁵⁷

An employer who knew of the vicious tendencies of an employee when intoxicated, permitted him to work with other employees while in an intoxicated condition. It was held that the employer was liable for injuries sustained by an employee who was assaulted by this employee while intoxicated during work hours.⁵⁸

A foreman of a section gang was assaulted when he attempted to compel a workman to use a shovel in a particular manner. It was held that the accident arose out of and in the course of the employment.⁵⁹

A fight began between a shovel engineer and a negro. The negro struck the engineer over the head with an iron, and another employee, fearing the negro would kill the engineer, hit him in the mouth with his fist and thereby lacerated his hand, which later became infected. It was held that the claimant had gone outside of the scope of his employment in taking part in the fight and assumed the risk incidental thereto.⁶⁰

Where a police officer was intentionally killed by a person he attempted to arrest, recovery could not be had where the statute excluded injuries resulting from the intentional acts of another.

55. *Trim Joint District School v. Kelly*, (1914), W. C. & Ins. Rep. 359, 136 L. T. J. 605, 6 N. C. C. A. 1010.

56. *Nisbet v. Rayne and Burn*, 2 K. B. 689, 3 N. C. C. A. 268.

57. *Anderson v. Balfour*, (1910), 2 Ir. Rep. 497, 3 N. C. C. A. 275.

58. *In re McNicol*, 215 Mass. 497, 4 N. C. C. A. 522, 102 N. E. 697, L. R. A. 1916A, 306.

59. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

60. *In re G. M. Armstead*, Op. Sol. Dep. C. & L. pg. 240.

"The plaintiffs in error, claimants before the commission, contend, in effect, that the above-quoted clause of section 8 of the statute of 1915 should not be literally construed, but that the words 'injury intentionally inflicted by another' should be interpreted to refer only to an injury intentionally inflicted by another for reasons personal to the assailant, and not to relate to, or include, any injury which, although inflicted intentionally by a third person, was one caused by the employment, or arose as the result of a peril incident to the employment as in the instant case. However much the construction contended for would result in harmonizing section 8 with the general purpose of the Workmen's Compensation Act, nevertheless the contention cannot be sustained. The clause and phrase in question is clear and explicit, and must be enforced according to its plain meaning. As said in *Hause v. Rose*, 6 Colo. 26: 'We cannot as a court, supply omissions, nor make law to fit an exceptional case. * * * The statute, being explicit, does not admit of interpretation beyond its express letter, and must be administered as we find it.'"⁶¹

Where homicide results from a quarrel wherein personal matters as well as matters pertaining to the employment have entered into the altercation, a finding that death was due to an injury arising out of and in the course of the employment was warranted.⁶²

Injuries sustained by a strikebreaker when assaulted by a striker after work hours away from the premises though in the company of the superintendant, are not compensable as they did not arise out of the employment despite the fact that at the time of hiring, the superintendant promised him that they would care for him and that he, the superintendant, would be with him after work hours.⁶³

Where an employee accidentally struck a foreman with a wheelbarrow, while pursuing his regular duties, and was assaulted by

61. *Hellburg v. Town of Louisville*, (Colo.), [1919], 180 Pac. 751, 4 W. C. L. J. 152.

62. *American Smelting & Refining Co. v. Cassil*, — Neb. —, (1920), 175 N. W. 1021, 5 W. C. L. J. 552; *Hinchuk v. Swift & Co.*, — Minn. —, (1921), 182 N. W. 622.

63. *Rourke's Case*, — Mass. —, (1921), 129 N. E. 603,

the foreman, the injuries sustained arose out of the employment.⁶⁴

Where a private in the quartermaster's corps shot the packmaster as the result of a quarrel over the killing of a dog, compensation was allowed.⁶⁵

§ 294. **Assault Resulting From Controversies Not Connected With Nor Pertaining to the Employment.**—A superintendant of an apartment house was injured by an assault committed upon him by a tenant of the building, as the result of a quarrel arising from insults offered the tenant's wife. The court held that the accident did not arise out of the employment, assaults being accidents "arising out of the employment" only when the employee is engaged in the master's business.⁶⁶

The claimant was shot by a negro janitor, and it appeared that the claimant, as foreman of the composing room, had a right to give orders pertaining to the janitor work of that room, and, if the orders were not obeyed, to report such violation to the employer. Claimant had the day prior to the shooting reported the janitor for refusal to obey orders. The janitor testified that claimant did not want him to work there, and that the foreman of the janitor work had told claimant to leave him alone, and that he shot claimant because claimant tried to shoot him. Affirming a determination of the board denying compensation, the court said that, "the test to be applied in assault cases was whether the attack grew out of the employment, out of the work or was one of personal vengeance." The power to determine from the evidence whether the assault grew out of the employment is vested in the board, and the burden of proof that the accident arose out of the employment, and that the person causing the assault was such a person as the employer should not have hired, rests upon the claimant. The

64. *American Steel Foundries v. Melnik*, — Ind. App. —, (1920) 126 N. E. 33, 5 W. C. L. J. 517.

65. *In re Wm. H. Daley*, 3rd A. R. U. S. C. C. 178.

66. *Muller v. H. & A. Cohen, Inc.*, 186 App. Div. 845, 174 N. Y. S. 736, (1919), 18 N. C. C. A. 1050, 3 W. C. L. J. 649; *Metropolitan Redwood Lbr. Co. v. Indus. Acc. Comm.*, — Cal. —, 182 Pac. 315, 4 W. C. L. J. 479.

finding of the board which was supported by the evidence will not be disturbed.⁶⁷

A chauffeur was sent out to drive a passenger to a station, and after arriving at the station and finding that the train was late, he proceeded to another point for his own and his passenger's convenience. While driving beyond his original destination, he was shot by the passenger, who suddenly became insane. In reversing an award the court held that the accident did not arise out of the employment, for the employee left the employment for purposes of his own.⁶⁸

A school district employed a young woman teacher for a one-room school in a densely wooded and sparsely settled part of the country. On her way to her boarding house, after her day's work at the schoolhouse was done, and when off the schoolhouse grounds, she was assaulted by an unknown man for the gratification of his passions, and as a part of the transaction she was shot and the sight of one eye was destroyed. The Workmen's Compensation Act (Gen. St. 1913, Sec. 8195, et seq.) gives compensation for personal injury "caused by accident, arising out of and in the course of employment." It does not cover workmen except while engaged in or about the premises where their work is done or their service requires their presence; and it excludes "an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of his employment." Without determining whether the injuries to the teacher arose in the course of the employment it was held that they were not caused by accident arising out of the employment, and that they were not compensable under the Compensation Act.⁶⁹

Two employees, engaged in skylarking, were stopped by the foreman and sent back to work, and later one hit the other on the

67. *Marshall v. Banker-Vawter Co.*, 206 Mich. 466, 173 N. W. 191, (1919), 18 N. C. C. A. 1051, 4 W. C. L. J. 399.

68. *Central Garage of La Salle v. Indus. Comm.*, 286 Ill. 291, 121 N. E. 587, (1919), 18 N. C. C. A. 1052, 3 W. C. L. J. 428.

69. *State ex rel. Common School District No. 1 in Itasca County v. District Court of Itasca Co.*, 140 Minn. 470, 168 N. W. 555, 17 N. C. C. A. 937, 2 W. C. L. J. 661.

side of the head with a pick and killed him. The court, in reversing an award, held that the employer is not charged with liability for the wrongful and atrocious act of a servant entirely outside the scope of his employment; that the compensation act did not provide an insurance for a workman against every happening to him while engaged in his employment, but only against accidents arising out of and in the course of his employment; an act done by a fellow employee entirely outside the scope of his employment, was not such an accident so arising.⁷⁰

A paperhanger refused to strike when asked by members of a rival union, and as a result was assaulted and severely injured. The court in a criminal proceeding suspended sentence provided the wrongdoers would pay the injured employee \$100.00 at once, and \$15 per week during disability, and to guarantee him earnings of at least \$15 per week after he should be able to go to work. Later the paperhanger brought action under the compensation act and the court refused to allow a reduction for the amount recovered from the wrongdoers. The Appellate court held that this was erroneous in that under the statute, a person injured through the negligence or wrongdoing of another not in the same employ, may elect as to which remedy he will pursue, and if he proceeds against the wrongdoer the employer is liable only for the difference between the amount recovered and the amount due under the compensation act, and in the event that he elects to take action under the compensation law he must assign his rights against the wrongdoer over to his employer or insurance carrier.⁷¹

In denying that the accident arose out of the employment where two employees engaged in controversy and one assaulted the other, the court said: "Brill and Lee had no connection with or authority over each other in the discharge of their respective duties, and there is no proof to show that the altercation between

70. *Mountain Ice Co. v. McNeil*, 91 N. J. L. 528, 103 Atl. 184, 16 N. C. C. A. 933. 1 W. C. L. J. 1102; *Rev'g*, — N. J. L. —, 103 Atl. 912; *Hulley v. Moosebrugger*, 88 N. J. L. 161, 95 Atl. 1007, L. R. A. 1916C, 1203; *Walther's v. American Paper Co.*, 89 N. J. L. 732, 99 Atl. 263.

71. *Dietz v. Solomnitz*, 179 App. Div. 560, 166 N. Y. S. 849, 16 N. C. C. A. 413.

them grew out of the manner of performing their work or had any connection with it. It does not appear that Lee was present when Brill spoke to Ashford about the bread. As Ashford and Brill were going to the manager's office Brill and Lee met, there was a sudden altercation between them, and Lee struck Brill. It is not sufficient that an accidental injury occur in the course of the employment but it must arise out of the employment. An accident to be within the Workmen's Compensation Act must have had its origin in some risk of the employment. There is no proof that the difficulty between Lee and Brill had its origin in or any connection with their employment. The proof is as consistent with the theory that it had no such origin or connection, but resulted from a previous feud or ill feeling between the two men, as it is with the theory that the quarrel or altercation grew out of the manner of conducting the business in which they were employed. It was incumbent upon the defendant in error to prove the accident arose out of the employment by direct and positive evidence, or by evidence from which such inference could be fairly and reasonably drawn. *Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. 149; *Wisconsin Steel Co. v. Industrial Com.*, 288 Ill. 206, 123 N. E. 295. Liability cannot rest upon imagination, speculation, or conjecture, upon a choice between two views equally compatible with the evidence, but must be based upon facts established by evidence fairly tending to prove them. *Peterson & Co. v. Industrial Board*, 281 Ill. 326, 117 N. E. 1033."⁷²

An employee was accidentally struck by a fellow employee and became angry and kicked his fellow employee, whereupon the latter shoved him, and he sustained injuries which finally resulted in his death. After stating that according to the facts found deceased was the aggressor, the court, in reversing an award, said: "The injury was not a peril of the service nor reasonably incident thereto. It arose wholly from a voluntary act of Griffin (deceased)

72. *Edelweiss Gardens v. Indus. Comm.*, 290 Ill. 459, (1919), 125 N. E. 260, 5 W. C. L. J. 176; *Romerz v. Swift & Co.*, — Kan. —, (1920), 89 Pac. 923, 6 W. C. L. J. 162; *In re Lester C. Hammond*, 2nd A. R. U. S. C. C. 279; *In re John L. Sullival*, 2nd A. R. U. S. C. C. 279.

entirely unnecessary, and not in the protection or advancement of the master's interest nor connected therewith. It was nothing more or less than the gratification of his personal feeling of animosity. No reasonable inference can be drawn which legitimately or fairly demonstrates that the injury to Griffin was an incident of his work. There was no causal connection between the work and the injury which resulted from the independent and affirmative and unjustifiable act of Griffin. This seems to have been clearly an injury which did not arise 'out of' the employment. It was rather outside of the employment and one which grew out of a situation inaugurated by the injured employee himself for his individual purpose." 73

A delivery man and collector for a brewery was shot one Saturday night while making a delivery. The assailant and his motive for shooting were unknown. In reversing an award, the court said: "If the shooting had been for the purpose of robbery then it could be said to be incidental to the employment but since there was no motive shown, no robbery having been committed the shooting might have been in revenge for a past wrong or something foreign to the employment. There is nothing in the evidence to show that deceased's employment necessarily exposed him to the injury incurred, therefore the accident did not arise out of the employment." 74

An employee, engaged as a night watchman, was shot by a policeman when he was mistakenly suspicioned for being a yeggman, who had recently robbed a post office. In holding that his death did not result from any special risk incident to the performance of his duties as a night watchman, the court said: "There was no evidence that this property ever had been injured by wrongdoers, or that from its character or location it was especially exposed to theft or harm at the hands of the trespassers. He was not shot while protecting his employer's property from thieves. At the time of this accident the property was in no way

73. *Griffin v. A. Robertson & Son*, 176 N. Y. App. Div. 6, 162 N. Y. S. 313, 14 N. C. C. A. 229.

74. *Schmoll v. Weisbrod and Hess Brg. Co.*, 89 N. J. L. 150, 97 Atl. 723, 14 N. C. C. A. 233.

threatened, nor did Harbroe suppose it was. And he was not fired upon because he was the watchman in charge. The injury might quite as well have been suffered by any person who happened to be in the locality, whether employed by the construction company or not. Further, although Harbroe mistakenly believed that the two approaching figures were 'yeggman,' they were in fact an officer of the law and his assistant, who were in the performance of their duty, seeking to apprehend the men who recently had robbed the post office. The injury they inflicted was the result of an unfortunate misapprehension on their part (to which Harbroe himself unwittingly contributed), and cannot reasonably be said 'to have had its origin in a hazard connected with the employment and to have flowed from that source as a rational consequence, * * * There was no evidence to support the finding that the employee's injury 'arose out of' his employment.'" ⁷⁵

Under the Nebraska Compensation Act an employee, who has been assaulted either in anger or in play, and sustains an injury, the injury sustained does not arise out of the employment. ⁷⁶

Where a strike breaker was injured by stones thrown by strikers, it was held that the accident did not arise out of the employment. ⁷⁷

An agreement with an employer to be protected against injury from strikers enlarges the responsibility of the employer pertaining to assaults, but does not affect the scope of the compensation act. ⁷⁸

Where an employee is injured by being struck by an iron thrown by another employee, while neither is at work, the accident does not arise out of the employment. ⁷⁹

75. In re Harbroe, 223 Mass. 139, 111 N. E. 709, 11 N. C. C. A. 246; Heideman v. American District Telegraph Co., 183 N. Y. S. 924, (1920), 6 W. C. L. J. 568.

76. Pierce v. Boyer-Van Kuran Lbr. & Coal Co., 99 Neb. 321, 156 N. W. 509, L. R. A. 1916D, 970.

77. Murray v. Denholm & Co., (1911), S. C. 1087, 5 B. W. C. C. 496.

78. Poulton v. Kelsall, [1912], 2 K. B. 131, 5 B. W. C. C. 318, 4 N. C. C. A. 947.

79. Armitage v. Lancashire & N. Y. Ry., (1902), K. B. 178, 6 N. C. C. A. 1024.

Where an employee was killed when interfering in a fight between his employer and another, with the intention of defending his employer, the accident does not arise out of the employment.⁸⁰

A cook was injured while trying to defend herself from a man who came out of the bar room to kiss her. It was held that the injury did not arise out of the employment.⁸¹

An employee was injured by a blow from a hatchet in the hand of his employer, intentionally inflicted. It was held that the accident did not arise out of the employment.⁸²

Under the Federal Act an employee injured by an assault from his employer, is injured by an accident arising out of the employment.⁸³

Wilful intention to injure another is a bar to compensation under the New York act. So where an outsider came visiting among the employees of a brewery during work hours, and hung around and talked to the fireman of the engine, the engineer becoming vituperative, seized a wrench and attacked the visitor, who knocked him down, it was held that the accident did not arise out of the employment, but was occasioned by the willful intention of the employee to injure the outsider.⁸⁴

A night watchman was struck on the head and killed by a fellow employee, whose purpose in doing so was robbery. In reversing an award, the court said: "While the injury occurred in, it did not arise out of the employment since the accident was in no way connected with decedent's employment. The killing was for a purpose entirely independent of the employment, and deceased would be subject to the same risk whether acting within his employment at the time of the accident or not."⁸⁵

80. *Collins v. Collins*, (1907), 2 Ir. Rep. 104, 41 Ir. L. T. 3, 6 N. C. C. A. 1025.

81. *Murphy v. Berwick*, 2 B. W. C. C. 103, (1909), 6 N. C. C. A. 1025.

82. *Blake v. Head*, 106 L. T. 822, 5 W. C. C. 303, (1912), W. C. R. 198, 6 N. C. C. A. 1025; *Gregory v. Chapman*, 38 N. J. L. J. 363.

83. *In re Flemming's Op. Sol. Dep. C. & L.* 187.

84. *Ludwig v. Grohs Sons*, 181 N. Y. App. Div. 907, 167 N. Y. S. 1111.

85. *Walter v. American Paper Co.*, 89 N. J. L. 732, 99 Atl. 263, 14 N. C. C. A. 239, Rev'g. 98 Atl. 264; *Mitchinson v. Day Bros.*, 6 B. W. C. C. 190, 6 N. C. C. A. 1024.

The claimant was assisting his brother to erect a house, and was told to allow no building material to be unloaded on the lot, that was intended for other houses which were being built near by. A teamster drove up with a load of brick and began unloading. The claimant protested, and a fight ensued in which the brother came off victorious. On the following day the teamster returned with a reserve force intending to get revenge. The claimant's brother was there that day and attempted to prevent the material from being placed on his lot and as a result a fight ensued. The claimant went to his assistance, and while keeping off the outsiders was struck in the eye by a missile thrown by one of the gang. The court, in denying that the accident arose out of the employment, said, his presence at the scene of the fighting was in no way connected with his employment. The master himself was there to protect his own property, and the brother rendered assistance solely in the interests of the master's safety, this may have been commendable, but was not a satisfactory answer to the question of what connection his acts had with his employment. Had he remained on the back porch where he was at work he would not have been injured, therefore the accident did not arise out of the employment.⁸⁶

An employee while at work was assaulted by a stranger, who was intoxicated. The court held that the claim could not be excluded merely because the accident was caused by a third person, even though the act was felonious, if at the time the workman sustained the injury he was exposed thereto by the nature of his employment. If the burns and bruises directly resulted from the accident, that is, a fall which, by the nature of the applicant's employment, was attended with special risk and dangers of such consequences as happened to applicant, the case was such as to show that it arose out of the employment, and it mattered not that the fall was caused by something not arising out of the employment, such as an unwarranted blow by an intoxicated stranger.⁸⁷

86. *Clark v. Clark*, 189 Mich. 652, 155 N. W. 507, 11 N. C. C. A. 240.

87. *Macfarlane v. Shaw (Glasgow, Ltd., (1915), Ct. of Sess. Cas. 273, (1915), W. C. & Ins. Rep. 32, 11 N. C. C. A. 242.*

"The question presented by this appeal is whether the injury arose out of the employment. Krasnoger Bros. were employed in constructing a building in the city of New York. The claimant was employed by them as a carpenter. Workmen in the employ of other employers were working on the same building. On August 10, 1918, during working hours, claimant entered a wash-room and found a workman in the employ of the general contractor tied hand and foot and fastened to the floor. He asked claimant to untie him, which the claimant did. Some workmen not in the employ of claimant's employers were angered at claimant's action, and seized claimant and said they were going to tie him down; but claimant successfully resisted them. Before the altercation had entirely subsided, the structural superintendent, having general charge of the work, struck the claimant several times with a saw, inflicting injuries for which claimant demands compensation. The State Industrial Commission awarded compensation against the employers, from which an appeal is taken. The claimant had been handling chalk, and went to the wash-room just before the closing of the day's work to wash his hands. It would appear, therefore, that the claimant was in the discharge of his duties, and in the course of his employment. The employers, in their report of the injury, say that the employee was doing his regular work at the time he was injured. The claimant had been doing a merciful act to the employee in releasing him. There is evidence that the attempt to tie the claimant had ceased, and that he was struck by the foreman while leaving. This brings the case within the decision in *Carbone v. Loft*, 219 N. Y. 37, 114 N. E. 1062, in which the workman was struck three-quarters of an hour after the verbal altercation. The award of compensation was affirmed. In the *Matter of Waters v. Taylor Co.*, 218 N. Y. 248, 113 N. E. 727, L. R. A. 1917A, 347, the court held that an employee was acting within the scope of his employment, so as to be entitled to the benefit of the act, when he left the strict line of his employment in the attempt to rescue another workman, technically in the employ of an independent contractor, from a danger which threatened his life, and which cost the life of the intercessor. The court held that it must have been within

the reasonable anticipation of this employer that his employees would do just as Waters did if the occasion arose.⁷⁸⁸

Where an auto salesman went for a ride at the invitation of a local dealer, and was accidentally shot by members of a posse, when mistaken for auto thieves, it was held that the injury to the salesman was due to an accident arising out of the employment, and not due to an assault directed against him by third parties for personal reasons.⁸⁰

A recent New York decision holds, that; where an abattoir worker, resenting a sudden assault by a coemployee who threw a piece of flesh at him used the flesh in striking another employee whom he erroneously believed to be the assailant, the latter in turn kicked the claimant, the injuries sustained as a result of the kick arose out of the employment. The court said: "In the instance case the claimant was not the aggressor, but was attending to his master's business on his master's premise at the time of the assault. He was waiting to "lug" away viscera, and while waiting there for his master's benefit and in the work for which he was employed was assaulted. In his excitement he defended himself by a counter attack upon, as it seems, another employee, with the resulting injury to himself. He did not initiate the "melee," but was desirous only of transacting his master's business in peace. This fellow employee had previously, he claimed, interfered with his working. The Industrial Commission has found that claimant was engaged in the regular course of his employment when he was kicked. This is a finding of fact. The claimant was thrown on the defensive striking Dudler with the piece of flesh, who kicked him. If the claimant was right in assuming that Dudler was his assailant, his striking back would have been the natural result of the act, and it might then well be said that claimant was within the act.

"The Workmen's Compensation Law (Consol. Laws, c. 67) should be construed broadly. Compensation under it does not de-

88. *Marino v. Krasnoger Bros.*, (Dec. 29, 1919), 179 N. Y. S. 314, 5 W. C. L. J. 437.

89. *Wold v. Chevrolet Motor Co.*, — Minn. —, (1920), 179 N. W. 219, 6 W. C. L. J. 699.

pend on any fault of the master or any negligence of the servant. The law was enacted to do away with the defenses which had governed the law of master and servant. The question in each case arising under the Workmen's Compensation Law is, "Was the injury received while engaged in the master's business?" If the servant had left his employment and was willfully pursuing designs of his own, he would not be entitled to compensation. The man who initiates an assault is doing a willful thing, but this cannot be said of the man who, surprised by physical assault or insult, reacts and in self-protection strikes another. His act is as involuntary as that of closing the eye to avoid dust, the same action and reaction which the law recognized in its definition of manslaughter.

"Danger of employment in modern business comes from the gathering together of great and dangerous machines. There is a line of cases which hold that if an employer continues to employ a man of dangerous temper after he has become aware of the same, and he inflicts injury on a fellow workman, the workman will be entitled to recovery under the Compensation Act. This, however, is a retrogression to the old master and servant law, and clearly against the intent of the Workmen's Compensation Law, which does not look for fault, but merely insures workmen in certain employments.

"In the instant case the injury was the result of provocation and passion engendered between employees in the course of their employment on the premises of the employer while engaged in their daily work. *McIntyre v. Rodger*, 41 Scot. L. Rep. 107; *Pekin Cooperage Co. v. Industrial Commission*, 285 Ill. 31, 120 N. E. 530.

"Under the circumstances of the instant case a workman at work for his master, who sustains injury because of his environment, is entitled to recover. This right to recover is not nullified by the fact that his injury is augmented by natural human reactions to the danger of injury threatened or done.

"The purpose of the Compensation Act was to benefit certain workmen otherwise without legal recovery. Under its provisions they may receive compensation independent of the fault of the employer at common law or other statutes.

“As Judge Pound said in the *Matter of Heitz v. Ruppert*, 218 N. Y. 148, 154, 112 N. E. 750, 752, (L. R. A. 1917A, 344), speaking of the effect and purpose of the Compensation Act:

‘The law has been and should be construed fairly, indeed liberally, in favor of the employee. Against its justness or economic soundness nothing can be said.’

‘I may seem harsh and arbitrary to impose liability upon a master for an assault committed by a workman upon a coworkman, but the purpose and intent of the statute is to fix an arbitrary liability in the greater public interest involved. This legislation was to ameliorate a social condition—not to define a situation or fix a liability by an adherence to the old common law. Liability was imposed regardless of fault—vitally different from that under the common law. Injury by an employee moved by some cause aside from his regular duties, may be considered an inevitable, however undesirable, result—a risk which is incident to the employment of many persons. It is a burden which industry may well bear under this legislation. *Hulley v. Moosbrugger*, 87 N. J. Law, 103, 93 Atl. 79; *Thorn v. Sinclair*, A. C. 127; *Pekin Cooperage Co. v. Industrial Board*, 277 Ill. 53, 115 N. E. 128; *Knopp v. American Car Co.*, 186 Ill. App. 605, 29 Yale Law Journal, 672. The claimant is entitled to the benefit of the act.’⁹⁰

Where an employee began a quarrel with a fellow employee in the morning over something which had occurred the previous evening and was killed in the affray, his death was not due to an accident arising out of the employment.⁹¹

Where a negro killed a fellow employee, who refused to bring the negro a drink when getting one for himself, the death was not due to an accident having its origin in a risk of the employment.⁹²

§ 295. Burden of Proof to Show that the Injury Was Caused by an Accident and that the Accident Arose out of and in the

90. *Verschler v. Joseph Stern & Son*, —N. Y. App. Div.—, 1920, 128 N. E. 126, 6 W. C. L. J. 472.

91. *Marion Coal Co. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 84, 6 W. C. L. J. 15.

92. *City of Chicago v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 49, 6 W. C. L. J. 17.

Course of the Employment.—A night watchman's duties required him to cross from one side of a ravine to another, using either a trestle or a narrow footbridge. He was last seen on the evening prior to his death when he reported for work. The next morning his body was found about 8 feet below the footbridge with injuries on his trunk, hands, and the back of his head. The night was exceedingly cold and there was some ice and snow on the trestle, but the footbridge had been cleared of ice and snow the previous day. The referee made an award, which was reversed by the court of common pleas. Reversing the judgment, the court said: "Where no facts appear indicating anything to the contrary, it may be presumed logically that an employee at his regular place of service, during his usual working hours, is there in discharge of some duty incident to his employment; and, when the dead body of an employee is found on the premises of his employer, at or near the regular place of service, under circumstances fairly indicating an accidental death which probably occurred during the usual working hours of the deceased, the inference may fairly be drawn, in the absence of evidence to the contrary, that the employee was injured in the course of his employment. Such is the case at bar."⁹³

Decedent was employed as a pipe fitter in connection with the operation of furnaces. He disappeared from work about midnight and his body was found in a river which bordered on the grounds where the plant was located. Evidence tended to show that there was intense heat about the furnaces and also some gas, and employees were often compelled to seek relief, on that account, by going out on the river bank for air. There was also testimony that, on the night of deceased's disappearance, there was no escaping gas, and that deceased was not required to make any repairs. When last seen he showed no signs of being affected by gas. Reversing a judgment of the court which affirmed an award for his death, the court held that the burden was on the applicant to prove that the accidental death arose out of the employment by direct

93. *Flucker v. Carnegie Steel Co.*, 263 Pa. 113, 106 Atl. 192, (1919), 18 N. C. C. A. 1055, 3 W. C. L. J. 780; *Sparks Milling Co. v. Indus. Comm.*, — Ill. —, (1920), 6 W. C. L. J. 299, 127 N. E. 737.

and positive evidence, or by evidence justifying such inference without resorting to surmise or conjecture, and that the evidence in the case was not sufficient upon which to predicate liability.⁹⁴

Where an employee was injured in the course of his employment pulling pumps and repairing pump jacks, the court held that the burden of proving that the relation of employer and employee existed, and that the injury was due to an accident arising out of the employment, rested upon the employee, but the burden of proving that the employment was merely casual rested upon the employer.⁹⁵

The applicant was struck in the eye with a piece of coal, but continued to work the remainder of the day, and reported the injury to the employer the following Monday. The employer sent him to an eye specialist, but despite medical treatment the vision of the eye was lost. The court held that "It was incumbent on the applicant to prove that his loss of sight was caused by the accident *Chicago & Alton Railroad Co. v. Industrial Board*, 274 Ill. 336, 113, N. E. 629; *Albaugh-Dover Co. v. Industrial Board*, 278 Ill. 179, 115 N. E. 834; *Ohio Building Safety Vault Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. 149; *Northern Illinois Traction Co. v. Industrial Board*, 279 Ill. 565, 117 N. E. 95; *Peterson & Co. v. Industrial Board*, 281 Ill. 326, 117 N. E. 1033." The evidence tended to show that applicant at the time of the accident, had been suffering from choroiditis, and that there was no connection between the blow on the eye and the loss of the sight, except as to 35 per cent, which was due to the scar, and that applicant would have gone blind anyway in the same length of time, and therefore he had failed to prove that the total blindness was caused by an accident arising out of the employment. The court ordered the award reduced accordingly.⁹⁶

94. *Wisconsin Steel Co. v. Indus. Comm.*, 288 Ill. 206, 123 N. E. 295, (1919), 18 N. C. C. A. 1056, 4 W. C. L. J. 168.

95. *Consumer's Mutual Oil Producing Co. v. Indus. Comm.*, 289 Ill. 423, (1919), 124 N. E. 608, 5 W. C. L. J. 31.

96. *Spring Valley Coal Co. v. Industrial Commission et al.*, 289 Ill. 315, 124 N. E. 545, 5 W. C. L. J. 64; *New Castle Foundry Co. v. Lysher*, — Ind. App. —, 120 N. E. 713, 17 N. C. C. A. 251, 3 W. C. L. J. 119.

An employee whose duty it was to mix paint in a factory, volunteered to remove a belt, the condition of which did not affect him or his work, and before the foreman had time to stop him he placed himself in a position where he could not avoid being injured. The court said: "It is conceded that this death was accidental, but the question is: Does the proof tend to show that the death occurred while deceased was reasonably fulfilling the duties of his employment or engaged in doing something incidental to it? The burden is on the applicant to prove that the accident arose in the course of and out of the employment by direct and positive evidence or by evidence by which such inference can be fairly drawn."⁹⁷

An employee fell on a sidewalk when going to pick up a rail. No one with him saw the fall or the occasion of the fall, but a passerby testified that he stumbled on a grate and fell. The court held that the burden of proving that an accident occurred which arose out of the employment rested upon applicant, and all the evidence should be considered and the preponderance of all the evidence must tend to substantiate applicant's claim. The commission's finding that applicant tripped on a grate while performing his duties and that the accident arose out of the employment is supported by some evidence and is therefore conclusive.⁹⁸

Where a contractor's employee assists with a machine or appliance belonging to the contractor, but in the work of a subcontractor or another to whom he is lent, he may, by giving his consent, become the servant of another, but there is a rebuttable presumption, that, in the management of such machine, he remains in the service of his original employer.⁹⁹

Where a foreman in a composing room was shot by a janitor, the burden rested upon the claimant of proving that the shooting occurred while the employee was engaged in defending his em-

97. *George S. Mephram & Co. v. Indus. Comm.*, 289 Ill. 484, (1919), 124 N. E. 540, 5 W. C. L. J. 36; *Laskowski v. Jessup & Moore Paper Co.*, — Del. —, (1919), 108 Atl. 281, 5 W. C. L. J. 167.

98. *Joseph Halstead Co. v. Indus. Comm.*, (1919), 122 N. E. 822, 287 Ill. 509; *Mailman v. Record Foundry & Machine Co.*, (1919), 118 Me. 172, 106 Atl. 606, 4 W. C. L. J. 205.

99. *Emack's Case*, 232 Mass. 596, (1919), 123 N. E. 86, 4 W. C. L. J. 94.

ployer or his employer's property or interests, or was in some way engaged in the duties of his employment, and that the assault was not made by the assailant merely for purpose of gratifying a personal revenge.¹

Where an employer alleges wilful misconduct on the part of the employee, and seeks to show that the employee was acting outside of the scope of his employment, the burden of proving the wilful misconduct rests upon the employer.²

If the claimant furnishes evidence from which an inference can reasonably be drawn that the injuries and death were due to the accident arising out of the employment within the meaning of the act, the burden then rests upon the employer to disprove the inference.³

The applicant must sustain his contention by a preponderance of the evidence, and a finding based upon mere guess, conjecture or possibility will not be allowed to stand.⁴

Where an employee overexerts himself and later develops a disease which does not necessarily connote a previous injury, the burden is on applicant to prove that the disease resulted from an injury.⁵

1. *Marshall v. Baker-Vawter Co.*, 206 Mich. 466, (1919), 173 N. W. 191, 4 W. C. L. J. 399; *Chaudier v. Stearns Culver Lbr. Co.*, 206 Mich. 433, 173 N. W. 198, (1919), 4 W. C. L. J. 508.

2. *Rosedale Cemetery Ass'n. v. Indus. Acc. Comm. of Cal.*, 37 Cal. App. 706, 174 Pac. 351, 17 N. C. C. A. 389, 2 W. C. L. J. 754.

3. *Sugar Valley Coal Co. v. Drake*, 64 Ind. App. —, 117 N. E. 937, 1 W. C. L. J. 594. *Murphy's Case*, 230 Mass. 99, 119 N. E. 657, 2 W. C. L. J. 270; *Peterson & Co. v. Industrial Board*, 281 Ill. 326, 117 N. E. 1033, 1 W. C. L. J. 335; *Haskell, etc. Car. Co. v. Brown*, 64 Ind. App. —, 117 N. E. 555, 1 W. C. L. J. 48; *Ohio Bldg. Safety Vault Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. 149; *Coastwise Shipping Co. v. Tolson*, 132 Mass. 203, 103 Atl. 478, 17 N. C. C. A. 252, 2 W. C. L. J. 91; *Mischaless v. Hammond Co.*, (Mich.), 166 N. W. 933, 1 W. C. L. J. 1055; *Muzik v. Erie R. R. Co.*, 85 N. J. L. 131, 88 Atl. 248, Aff'g. 92 Atl. 1087, 86 N. J. L. 695, Ann. Cas. 1916A, 140.

4. *Albaugh-Dover Co. v. Indus. Bd.*, 278 Ill. 179, 115 N. E. 834; *Bloomington R. Co. v. Indus. Bd.*, 276 Ill. 454, 114 N. E. 939; *In re Dube*, 226 Mass. 591, 116 N. E. 234; *Piske v. Brooklyn Cooperage Co.*, 143 La. 455, 78 So. 734, 16 N. C. C. A. 939; *Crucible Steel Forge Co. v. Moir*, 219 Fed. 151, 8 N. C. C. A. 1006.

5. *Linnane v. Aetna Brg. Co.*, 91 Conn. 158, 99 Atl. 507.

Where an engineer was engaged in heavy work, it will not be inferred from this fact alone that a hernia suffered by claimant was due to an accident arising out of the employment, but he must prove this alleged fact.⁶

When a workman receives an injury which could have been sustained elsewhere than in the course of the employment and must have arisen out of it, he need not prove the exact cause of the injury to entitle him to compensation.⁷

Applicant, seeking compensation for the death of an employee, must prove by competent proof the death of the servant. This proof is sufficient if it would produce conviction in an unprejudiced mind. The proof need not entirely exclude any possibility of death due in part to a diseased condition; it is sufficient if the accident is shown to have been the moving cause.⁸

A pipe fitter engaged in a quarrel over a leak that was to be repaired, and was injured in a fight that ensued. In holding that the board was justified in finding that the accident arose out of the employment, the court said: "This court has said that the burden of proof rests upon the applicant to furnish evidence from which an inference can logically be drawn that the injury arose out of and in the course of the employment, but that such proof may be circumstantial as well as direct. *Ohio Building Vault Co. v. Industrial Board*, supra, and cases there cited. We have also said that it is impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn by the Industrial Board, but that the evidence must be such as would induce a reasonable man to draw it; that where there is ground for comparing and balancing probabilities at their respective

6. *Chicago Ry. Co. v. Indus. Bd.*, 274 Ill. 336, 113 N. E. 629; *Nagy v. Solvay Process Co.*, 201 Mich. 158, 166 N. W. 1033, 1 W. C. L. J. 1049; *Tackles v. Bryant, etc. Co.*, 200 Mich. 350, 167 N. W. 36, 1 W. C. L. J. 1031.

7. *In re Bean*, 227 Mass. 558, 116 N. E. 826; *Heileman Brewing Co. v. Shaw*, 154 N. W. 631, 161 Wis. 433; *Stuart v. Kansas City*, 102 Kan. 307, 171 Pac. 913, 2 W. C. L. J. 58.

8. *Western Grain Products Co. v. Pillsbury*, 173 Cal. 135, 159 Pac. 423; *Shell Co. v. Indus. Acc. Comm.*, 36 Cal. App. 463, 172 Pac. 611, 2 W. C. L. J. 34; *Bucyrus Co. v. Townsend*, 64 Ind. App. —, 117 N. E. 565, 1 W. C. L. J. 166.

values, and where the more probable conclusion is that for which the applicant contends, the arbitrator is justified in drawing an inference in favor of the applicant. *Peoria Railway Terminal Co. v. Industrial Board*, 279 Ill. 352, 116 N. E. 651. It has also been said that what is evidence of a fact and what is merely guessing at the fact cannot be defined by any formula that one can invent; that what is wanted is to weigh the probabilities, to see if there be proved facts sufficient to enable one to have some foothold or ground for comparing and balancing the probabilities and their respective values, one against the other. *Owners of Ship Swansea Vale v. Rice*, 4 B. W. C. C. 298. While the burden of proof is on the applicant to prove his case, this does not mean that he must demonstrate it beyond all reasonable doubt. It only means that there must be evidence in his favor upon which a reasonable man can act. If the evidence, though slight, is sufficient to make a reasonable person conclude that the applicant was injured while performing his duties in the course of his employment or duties incidental to that employment, then the case is proved. *Marshall v. Owners of Ship Wild Rose*, 3 B. W. C. 514. In proceedings under the Workmen's Compensation Law this court's consideration of the evidence is limited to the inquiry whether the record contains competent evidence to sustain the award, and, if so, the weight of evidence to the contrary will not be considered. *Pekin Cooperage Co. v. Industrial Comm.*, supra. The only question before the court is whether the Industrial Board was justified, on the facts proved, in drawing the conclusion it has drawn. The finding of the Industrial Board is not to be set aside if warranted by evidence, although the court might feel that a different conclusion would have been reached if the members of the court had been called upon to decide the question in the first instance. *Von Ette v. Globe Newspaper*, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641.⁷⁹

9. *Swift & Co. v. Indus. Comm.*, (1919), 287 Ill. 564, 122 N. E. 796, 4 W. C. L. J. 35, 18 N. C. C. A. 1049; Also *Westman's Case*, 118 Me. 133, (1919), 106 Atl. 532, 4 W. C. L. J. 213; *David Bradley Mfg. Co. v. Indus. Bd. of Ill.*, 283 Ill. 468, 119 N. E. 615, 17 N. C. C. A. 250, 2 W. C. L. J. 226.

Where the circumstances surrounding deceased's death are such as to lead an unprejudiced mind to reasonably infer that the death was caused by accident, the evidence need not negative all other possible causes of death.¹⁰

The court, in a leading case, stated the general rule as follows: "It is well settled that the burden rests upon the one claimnig compensation to show by competent testimony, direct or circumstantial, not only the fact of an injury, but that it occurred in connection with the alleged employment, and both arose out of and in the course of the service at which the party was employed."¹¹

10. *Bloomington, etc. Ry. Co. v. Indus. Bd.*, 276 Ill. 454, 114 N. E. 939; *In re Uzzio*, 228 Mass. 331, 117 N. E. 349, 1 W. C. L. J. 80; *Proctor v. Serbino* (owners), (1915), W. C. & Ins. Rep. 425, 10 N. C. C. A. 618; *De Mann v. Hydraulic, etc. Co.*, 192 Mich. 594, 159 N. W. 380; *Fogerty v. National Biscuit Co.*, 221 N. Y. 20, 116 N. E. 346, Rev'g 175 App. Div. 729, 161 N. Y. S. 937; *Dixon v. Andrews*, 92 N. J. L. 512, 103 Atl. 410, 2 W. C. L. J. 105; *Hollenbach Co. v. Hollenbach*, 181 Ky. 262, 204 S. W. 152, 2 W. C. L. J. 493; *State v. District Court*, 134 Minn. 324, 159 N. W. 755; *Guthrie v. Detroit Shipbuilding Co.*, 200 Mich. 355, 167 N. W. 37, 1 W. C. L. J. 1035; *Sparks Milling Co. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 737, 6 W. C. L. J. 299.

11. *Hills v. Blair et al.*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409; *McCoy v. Mich. Screw Co.*, 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A, 323; *Bryant v. Fissel*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; *In re Von Ette*, 223 Mass. 56, 111 N. E. 697; *Union Sanitary Mfg. Co. v. Davis*, 63 Ind. App. 548, 115 N. E. 676; *Savoy Hotel Co. v. Industrial Board*, 279 Ill. 329, 116 N. E. 712; *Chicago, etc. R. Co. v. Industrial Board*, 274 Ill. 336, 113, N. E. 629; *Roebblings Sons Co. v. Industrial Acc. Comm.*, 36, Cal. App. 10, 171 Pac. 987, 2 W. C. L. J. 38; *Hallett's Case*, 230 Mass. 326, 119 N. E. 673, 2 W. C. L. J. 281; *Albaugh-Dover Co. v. Industrial Board*, 278 Ill. 179, 115 N. E. 834; *Draper v. Regents*, 195 Mich. 449, 161 N. W. 956; *Schmoll v. Weisbrod, etc. Brewing Co.*, 89 N. J. L. 150, 99 Atl. 723; *Inland Steel Co. v. Lambert*, 64 Ind. App. —, 118 N. E. 162, 1 W. C. L. J. 347; *Peoria R., etc. Co. v. Industrial Board*, 279 Ill. 352, 116 N. E. 651; *Armour & Co. v. Industrial Board*, 273 Ill. 590, 113 N. E. 138; *De Mann v. Hydraulic, etc. Co.*, 192 Mich. 594, 159 N. W. 380; *Tackles v. Bryant, etc. Co.*, 200 Mich. 350, 167 N. W. 36, 1 W. C. L. J. 1031; *Guthrie v. Detroit Shipbuilding Co.*, 200 Mich. 355, 167 N. W. 37, 1 W. C. L. J. 1035; *Griffith v. Cole Bros.*, 183 Ia. 415, 165 N. W. 577, 1 W. C. L. J. 368; *Brinsko's Estate v. Lo'igh Valley R. Co.*, 90 N. J. Law 658, 102 Atl. 390, 1 W. C. L. J. 431; *Robinson v. State*, 93 Conn. 49, 104 Atl. 491, 2 W. C. L. J. 779; See, *contra*, *McCabe v. Brooklyn Heights R. Co.*, 177 App. Div.

Where an engine hostler was last seen alive working on his engine and ten minutes thereafter was found lying by the engine, dead with a bullet wound, and there was nothing to indicate suicide nor under what circumstances the shooting occurred, the court said: "The case turns on the burden of proof as to that fact; the lower court held it was upon the claimants, while the compensation board held it was upon the defendant. We agree with the latter. The general rule is one of liability for violent injury suffered by an employee in the course of his employment, as this undoubtedly was; the exception is that the employer is not liable for 'an injury caused by an act of a third person intended to injure the employee because of reasons personal to him.' The burden of proving the exception rests upon the party interposing it as a defense, for as to that issue he holds the affirmative. See *Žerbe v. Miller*, 16 Pa. 488, 16 Cyc. 928. The burden of proof of a particular allegation rests upon the side to whose case it is necessary, and that is

107, 162 N. Y. S. 741; *Chludzinski v. Standard Oil Co.*, 176 App. Div. 87, 162 N. Y. S. 225; *Englebreetsen v. Indus. Acc. Comm.*, 170 Cal. 793, 151 Pac. 421, 10 N. C. C. A. 545; *Fragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475; *In re Savage*, 222 Mass. 205, 110 N. E. 283; *Thackway v. Connelly & Sons*, 3 B. W. C. C. 37; *Lendrum v. Ayr Steam Shipping Co., Ltd.*, (1915), A. C. 217, (1914), W. C. & Ins. Rep. 438, (1914), 2 Sc. L. T. 137, 8 N. C. C. A. 1077; *Hopkins v. Port Reading R. Co.*, 38 N. J. L. J. 19; *Frith v. Louisianian (owners of)*, (1912), W. C. Rep. 285, 9 N. C. C. A. 262; *Murphy & Sandwith v. Cooney*, (1914), W. C. & Ins. Rep. 44, 9 N. C. C. A. 263; *Smith v. Crescent Belting Co.*, 37 N. J. L. J. 292, 10 N. C. C. A. 640; *Zabriskie v. Erie R. Co.*, 85 N. J. L. J. 157, 4 N. C. C. A. 778; *Curran v. Newark Gear Cutting Machine Co.*, 37 N. J. L. J. 21; *Chicago Great Western R. Co. v. Indus. Com. of Ill.*, 284 Ill. 573, 120 N. E. 508, 3 W. C. L. J. 14; *Dow's Case, In re Mutual Liab. Assur. Co.*, 231 Mass. 341, 3 W. C. L. J. 144, 121 N. E. 19; *Ginsburg v. Burroughs Adding Machine Co.*, 204 Mich. 130, 170 N. W. 15, 3 W. C. L. J. 317; *Hege & Co. v. Tompkins*, — (Ind. App.) —, (1919), 121 N. E. 677, 3 W. C. L. J. 451; *Rish v. Iowa Portland & Cement Co.*, (Iowa), (1919), 170 N. W. 532, 3 W. C. L. J. 463, *Nelson Const. Co. v. Indus. Com. of Ill.*, (1919), 286 Ill. 632, 122 N. E. 113, 3 W. C. L. J. 605; *Benjamin J. Shaw Co. v. Palmatory*, (Del.), (1919), 105 Atl. 417, 3 W. C. L. J. 424; *Carberry v. Delaware L. & W. R. Co.*, 93 N. J. L. 414, (1919), 102 Atl. 364, 5 W. C. L. J. 419; *Grant v. Fleming Bros. Co.*, — (Ia.) —, 176 N. W. 640, 5 W. C. L. J. 688; *Morris & Co. v. Indus. Comm.*, — Ill. —, (1920), 128 N. W. 727, 7 W. C. L. J. 41.

the defendant here. See 5 Am. & Eng. Enc. of L. (2d. Ed.), p. 24."¹²

"The decedent, apparently while on his way to that part of the employer's plant where his services were to begin presently, was passing down an alley between rows of machinery, when he was warned of an approaching electric truck from the rear. In stepping aside, he appears to have reeled and walked backward upon his heels, falling in such a manner as to produce a fracture of the skull resulting in death some hours later. While it is highly probable that, had he been perfectly sober, the accident would not have occurred, the statute provides that in order to forfeit the benefits of the act, the injury must result 'solely from the intoxication of the injured employee while on duty.' Workmen's Compensation Law, section 10. No such condition is shown by the evidence; certainly the presumption is not overcome, and the award must be sustained. The injury occurred upon the premises of the employer, apparently while the decedent was about to take up the duties of his employment, and the presumptions of section 21, as well as the adjudications (*Murphy v. Ludlum Steel Co.*, 182 App. Div. 139, 169 N. Y. Supp. 781), support the conclusions of the commission. The award should be affirmed."¹³

An employee was sent to a private railroad yard, to unload a carload of lumber. He twice telephoned his employer about the nonarrival of the trucks with which to remove the lumber. He was killed in a nearby railroad yard, through which he might have gone to reach a telephone. The court, holding that the accident arose out of the employment, said: "It is not known definitely from what point the deceased had sent in the telephone calls to his employer, but there was a telephone at the offices of the railroad, near the place where the deceased was killed. The commission assumed that the deceased was on his way to telephone his employer once more when he was struck and killed. No one knows the purpose to serve which, the deceased had gone upon the railroad

12. *Keyes v. New York Ry. Co.*, 265 Penn. 105, (1919), 108 Atl. 406, 5 W. C. L. J. 464.

13. *Richards v. New York Air Brake Co.*, (Dec. 29, 1919), 179 N. Y. S. 317, 5 W. C. L. J. 443, 190 App. Div. 78.

lands. He may have gone there in aid of his master, or upon business or pleasure of his own. There being no substantial evidence to indicate the contrary, it must be presumed that his journey was made to serve his master, and that he was killed by an accident arising out of and in the course of his employment."¹⁴

RULINGS AFFECTING SPECIFIC CASES AS ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

§ 296. **Acting Under Unauthorized Orders.**—The general rule, governing cases wherein an employee performs an act outside of the scope of his regular duties, at the direction of one who has no authority to give such orders, and is injured while so doing, in the mistaken belief that the party giving the orders had authority to give such orders does not make the accident one arising out of and in the course of the employment. But orders given by one superior in authority presents a different question, and the tendency of the decisions seems to be to the effect that the injured employee is entitled to compensation. So, where a cinder pit man falsely stated to decedent, his co-employee, that the general foreman told him to direct decedent to act in his place while he did something else, and decedent acted on such orders and was killed, it was held that the accident could not be said to arise out of the employment in which deceased was expected to engage.¹⁵

Where a superintendant instructs a servant to perform certain duties for the benefit of the superintendant, and the servant is injured while so doing, believing that he was acting for his master and is injured, an instruction relieving the master from liability, on the ground that the injury occurred while not engaged about the masters business, is properly refused.¹⁶

A minor, employed by a newspaper establishment as a carrier, worked under a foreman whose duties were in no way connected

14. *Smith v. A. M. Oesterheld & Son*, (1919), 179 N. Y. S. 10, 5 W. C. L. J. 445, 189 App. Div. 384.

15. *Southern Railway Co. in Kentucky v. Popes Admr.*, 119 S. W. 237, 133 Ky. 835.

16. *Sims v. Omaha K. C. & E. Ry Co.*, 89 Mo. App. 197.

with the operation of the machinery. The foreman, without authority, ordered the minor to remove papers from a folding machine, and he was injured while obeying. It was held that the minor was a mere volunteer, and the master was not liable.¹⁷

Where one complies with an order given to him by one from whom he receives his orders, which order he knew or ought to have known the party had no authority to give, as it was expressly against the rules of the employer, and the employee in obeying such order is injured, the injury may nevertheless be an accident arising out of the employment.¹⁸

Where a boy was accustomed to do all sorts of things at the direction of his foreman, and was told by another that the foreman directed him to do certain work which statement was false but believed by the boy and acted upon, with the result that the boy was injured, it was held that the accident arose out of and in the course of the employment.¹⁹

Where an employee was injured while acting under the orders of a fire warden, as authorized by a statute, it was held that the injury could not be said to have arisen out of his employment.²⁰

The applicant, who was employed as a teamster, in a municipal woodyard, for his board and lodging, was injured while acting outside of the scope of his regular duties, but in obedience to the orders of a superintendent who had general authority to give orders. It was held that the accident arose out of and in the course of the employment.²¹

§ 297. **Acids.**—An employee found that there was no hot water for cleaning up after work and endeavored to heat water by placing a bucket in what he supposed was a tank of hot water, but which was a tank of acid. The acid exploded and injured him.

17. *Hatfield v. Adams*, 96 S. W. 583, 29 Ky. Law. 880.

18. *Statham v. Galloways Ltd.*, 2 W. C. C. 149; In re Felix McGowan, 3rd. A. R. U. S. C. C. 172.

19. *Brown v. Scott*, (1899), 1 W. C. C. 11.

20. *Kennelly v. Stearns Salt, etc., Co.* 190 Mich. 628, 157 N. W. 378.

21. *City of Oakland v. Indus. Acc. Comm. of Cal.*, 35 Cal. 484, 170 Pac. 430, 1 W. C. L. J. 488.

In holding that the accident arose out of and in the course of the employment, the court said: "The tank of acid constituted an insidious danger and potential peril to which employees in that institution were in some degree exposed. The injury sustained by appellee had its origin in conditions of such a nature as would prompt one to conclude, as of first impression, that it arose out of the employment. As against that conclusion, it may be said with much force that the workman stepped so far outside the custom as to exceed the bounds of reason; and that by his own rash conduct he transformed a latent into an active peril, thereby creating the hazard which resulted in his injury."²²

Where an employee sustained an injury to his eye, while cleaning out a storage tank when acid splashed into his eye, it was held that he sustained an injury arising out of the employment.²³

An employee, who was engaged in drawing wire and handling acid, contracted rash and eczema due to the acid. It was held that she had suffered an injury arising out of the employment.²⁴

An employee who was engaged in handling cloth treated with chemicals contracted a rash which later developed into eczema and spread over his whole body. The court held that the evidence was sufficient to justify the board in finding that claimant suffered an accidental injury arising out of the employment.²⁵

Where poisonous substance enters the system though an abrasion of the skin while the employee is acting within the course of his employment, he has sustained an injury arising out of the employment.²⁶

Where an employee, engaged in attending to stopcocks on acid barrels, sustained injury to his eyes from acid spurting from a

22. *In re Ayers* (Ind. App.), 121 N. E. 446, 18 N. C. C. A. 1022 (1919).

23. *Armstrong v. California Rex Spray Co.*, 1 Cal. I. A. C. D., (1914), 190, 10 N. C. C. A. 261; *Anderson v. Ashmore Mut. Tel. Co.*, Ill. Ind. Bd. Dec., (1915), 10 N. C. C. A. 262; *Cox v. Gainsley*, 2 Cal. I. A. C. D., (1915), 230, 10 N. C. C. A. 264.

24. *Dolan v. Massachusetts, Wkm. Comp. Cases*, (1913), 259, 10 N. C. C. A. 262.

25. *Riker v. Llandale Bleach Dye & Print Works*, 36 N. J. L. 305, 10 N. C. C. A. 262; *Boris v. Frankfort Gen. Ins. Co.*, 1 Mass. Wkm. Comp. Cas., (1913), 276, 10 N. C. C. A. 264.

26. *In re Goldberg*, Ohio Ind. Comm. Dec., (1914), 10 N. C. C. A. 263.

defective stopcock, it was held that he sustained an injury arising out of the employment.²⁷

An employee was disfigured by coming in contact with acids. He sought compensation claiming that his disfigurement prevented him from obtaining work. The court held that compensation will not be awarded for mere disfigurement, but if it were shown that because disfigurement precluded an employee from obtaining work that compensation would be granted. In the present case the applicant did not sustain by evidence the allegation of non-ability to obtain work, and therefore his claim was dismissed.²⁸

Where an employee, engaged in cleaning a floor, sustained an abrasion on the ends of his fingers, but it was shown that the acids used were disinfectants and that the germs which caused infection were not due to the solution, it was held that the applicant had not shown that the injury was due to an accident arising out of the employment.²⁹

An employee was requested to bring a bottle of muriatic acid to the place of his employment the next day. He purchased it and placed it in his hip pocket, and it broke while he was sitting in a saloon talking to friends, some two or three hours later. It was held that the accident did not arise out of the employment, but the board said that if the employee had purchased the muriatic acid and proceeded within a reasonable time to his home, and while on his way received the injury, there would probably be no question as to his right to compensation, or if having taken the acid home, he met with the injury while taking it to his place of employment the following morning, his right to compensation would not be denied.³⁰

27. *Del Bianco v. Gen. Chemical Co. of Cal.*, 2 Cal. I. A. C. D., (1915), 210, 10 N. C. C. A. 265.

28. *Clooney v. Crescent Glass Specialty Co.*, 37 N. J. L. J. 82, 10 N. C. C. A. 265.

29. *Norris v. Williams & Larson*, 3 Wis. I. C. D., (1914), 69, 10 N. C. C. A. 266; *Mrczee v. Pfister & Vogel Leather Co.*, 3 Wis. I. C. D., (1913), 46, 10 N. C. C. A. 266; *Murphy v. Employer's Liab. Assur. Corp. Ltd.*, 2 Mass. Wkm. C. C., (1914), 643, 10 N. C. C. A. 269.

30. *Callahan v. Employer's Liab. Assur. Corp.*, 2 Mass. I. A. Bd. 684, 12 N. C. C. A. 397.

§ 298. **Act of God.**—Where a factory foreman suffered a fatal injury when the walls of a building collapsed on account of a high wind while the foreman was attempting to close windows, a part of his duties, death was held to have arisen out of and in the course of his employment, and not to have been caused by an act of God.³¹

Where an employee was accidentally drowned while on a dredge on account of a violent storm, recovery on the employer's insurance policies could not be defeated under the Workmen's Compensation Act on the ground that the accident was an act of God, since this obligation having been voluntarily and knowingly entered into, with knowledge of all the dangers incident to this class of employment, this absolute and unqualified contract of insurance was not one the surety company was bound or compelled to make, nor did the law require any such duty or impose any such obligation upon it, as would permit it to excuse itself by pleading an inevitable accident or the act of God.³²

Death from lightning, while operating a steel road grader was due to an act of God and not to any peculiar hazard of the employment.³³

Where an employee was killed in a cyclone, while working in a plant, where ammonia fumes and scalding steam contributed to his injuries the court in holding that the death was due to a peculiar risk of the employment said: "We believe the reasonable rule to be that if deceased, by reason of his employment, was exposed to a risk of being injured by a storm which was greater than the risk to which the public in that vicinity was subjected, or if his employment necessarily accentuated the natural hazard from the storm, which increased hazard contributed to the injury, it was an injury arising out of the employment, although unex-

31. *Reid v. Automatic Electric Washer Co.*, — Ia. —, 179 N. W. 323, 6 W. C. L. J. 662.

32. *Southern Surety Co. v. Nelson*, — Tex. Civ. App. —, (1920), 223 S. W. 298, 6 W. C. L. J. 508; *Southern Surety Co. v. Stubbs*, 199 S. W. 343, 1 W. C. L. J. 444.

33. *Wiggins v. Indus. Acc. Bd.*, — Mont. —, 170 Pac. 9, 1 W. C. L. J. 643.

pected and unusual. An injury, to come within the Compensation Act (Laws 1913 p. 335,) need not be an anticipated one, nor, in general, need it be one peculiar to the particular employment in which one is engaged at the time. While the risk arising from the action of the elements, such as a cyclone, is such a risk as all people of the same locality are subjected to independent of employment, yet the circumstances of a particular employment may make the danger of receiving a particular injury through such storm an exceptional risk, and one to which the public is not subjected. Such injury may be then said to rise out of the employment. In the instant case, while the risk of being injured by this cyclone may be said to have been a risk common to the public in the vicinity of such cyclone, regardless of employment, yet if there was in the circumstances of Kilgore's employment an unusual risk or danger of injury from the destruction by storm of the building in which he was employed, such risk may be said to be incident to the employment of the deceased, and the injury received to rise out of such employment. Deceased at the time the storm broke was engaged in assisting and directing the closing up of the plant of defendant in error. These duties took him among the steam pipes and ammonia coils, which subjected him to an unusual risk of being injured from escaping steam and ammonia fumes should the building be destroyed by storm. The evidence shows that the ammonia fumes and scalding steam contributed most largely to the injuries which caused his death. We are therefore of the opinion that there were in the circumstances of the employment of the deceased risks of being injured by the storm not common to the public in that vicinity, and the circuit court therefore erred in setting aside the award.'³⁴

§ 299. **Anaesthetic Causing Death During Surgical Operation.**

—Where a workmen's arm was so badly cut by his coming in contact with a saw that an immediate amputation was made necessary without sufficient time to prepare him for ether, and as a re-

34. Central Ill. Pub. Serv. Co. v. Indus. Comm., — Ill., —, (1920), 126 N. E. 144, 5 W. C. L. J. 661..

sult he contracted ether pneumonia and died, it was held that the death was due to the accident, which arose out of and in the course of the employment.³⁵

Where an employee suffered an injury in the course of his employment, including a laceration of his fingers, and gangrene set in, necessitating an operation, and later a second operation was necessary, and as a result of the anaesthetic the patient developed pneumonia and died, the death was held to be due to the accident.³⁶

Where a workman crushed his hand, and by a skillful operation the hand was saved, but later a second operation became necessary to prevent the hand becoming stiff and useless, and the patient died under the anaesthetic, it was held that the second operation was merely a continuation of the first, and that the death arose from the accident, which occurred in the course of the employment.³⁷

An employee received an injury necessitating the amputation of one of his fingers. When he was recovering from the anaesthetic the surgeons decided to remove a bad tooth of which he had complained. Further anaesthetics were administered, and an unsuccessful attempt was made to remove the tooth. Shortly afterwards the workman died. In a claim for compensation it was held that the workman died from a failure of respiration caused by the anaesthetic, and that it was as likely that he died from an attempt to swallow blood oozing from his tooth as it was that the first anaesthetic caused it, and the onus of proving the death was due to an accident arising out of the employment had not been discharged.³⁸

§ 300. **Anthrax.**—Where a wool sorter became infected with anthrax germs while working in the course of his employment,

35. In re Raymond Mass. Wkm. Comp. Rep., (1913), 277, 6 N. C. C. A. 627; O'Connor v. Daly, 1 Conn. Comp. Dec. 643.

36. Favro v. Board of Public Library Trustees, 1 Cal. I. A. C. D., (1914), 1, 6 N. C. C. A. 627.

37. Shirt v. Calico Printers' Ass'n., Ltd., 78 L. J. K. B. 528, 2 B. W. C. C. 342, (1909), 2 K. B. 51, 100 L. T. 740, 25 L. T. R. 451, 53 Sol. J. 430, 6 N. C. C. A. 627.

38. Charles v. Walker, Ltd., 25 T. L. R. 609, 2 B. W. C. C. 5, (1909), 6 N. C. C. A. 628.

and later died, the court held that the death was due to an accident arising out of and in the course of the employment, within the meaning of the act.³⁹

Decedent was engaged in handling hides in a tannery. A day or so later he noticed a swelling on his neck under his jaw. He grew rapidly worse and died a few days later from septic infection. The board found that anthrax germs had been taken up by the respiration organs and carried into his system, an occurrence so unusual in the work at which he was engaged as to constitute an accident arising out of his employment. On appeal the finding of the board was affirmed.⁴⁰

An employee engaged in weighing hides suffered a fissure in the back of his hand as a result of wet salt permeating his gloves. Anthrax germs from dirty and diseased hides entered his system through this fissure. In affirming an award, the court said: "The claimant, in the course of his employment and as a result thereof, had received an abrasion on his hand or a fissure therein. This may properly be deemed an accidental injury arising out of and in the course of his employment, and the disease or infection caused by the anthrax germ may be deemed 'such disease or infection as may naturally and unavoidably result' from such injury, within the meaning of the statute."⁴¹

Where a workman suffered from anthrax as a result of bacillus entering into his eye, while pursuing his usual course of employment sorting wool, it was held that he suffered from an accident arising out of and in the course of his employment.⁴²

Where an employee had cut himself with a razor when not engaged in the duties of his employment, and later contracted anthrax germs through the cut on his face and died as a result there-

39. *McCauley v. Imperial Wollen Co.*, 261 Pa. 312, 17 N. C. C. A. 864, 104 Atl. 617.

40. *Dove v. Alpena Hide & Leather Co.*, 198 Mich. 132, 164 N. W. 253.

41. *Hiers v. Hull & Co.*, 178 N. Y. App. Div. 350, 14 N. C. C. A. 853, 164 N. Y. S. 767.

42. *Brintons Ltd. v. Turvey*, (1905), A. C. 230, 74 L. J. K. B. 474, 92 L. T. 578, 21 T. L. R. 444, 53 W. R. 641, 7 W. C. C. 1, 6 N. C. C. A. 880; *Bellamy v. Humphries*, (1913), W. C. & Ins. Rep. 169, 6 B. W. C. C. 53.

of, the court held that the death was proximately due to an accident arising out of and in the course of the employment.⁴³

Evidence that a hostler died of anthrax, which resulted from infection through a boil in his nose, without proof that he came in contact with any diseased animal, except a lame horse, is insufficient to show that the disease was contracted in the course of his employment.⁴⁴

§ 301. **Appendicitis.**—Where an employee was kicked in the stomach by a mule, and later the employee was operated on in a hospital for appendicitis and death resulted from general peritonitis following an acute attack of appendicitis, the board found that the death was due to the kick in the stomach, and therefore was the result of an accident arising out of and in the course of the employment. On appeal the court held that in view of such finding the burden of proving that it did not so arise rested on the employer.⁴⁵

Where an employee slipped while climbing out of a prism of a barge canal, striking his abdomen and injuring a diseased appendix, and the fall caused an acute exacerbation thereof, producing a rupture, from which acute peritonitis developed and caused his death, it was held that the injury was due to an accident arising out of the employment.⁴⁶

Where a collier complained of being accidentally hurt by coal rolling down against him from a pile as he was filling baskets of coal, and later he died of appendicitis and a rupture of the bowels, the court held that the evidence was sufficient to establish

43. *Eldridge v. Endicott-Johnson & Co.*, 177 N. Y. Supp. 863, (1919), 4 W. C. L. J. 621, 189 App. Div. 53. This case was reversed on appeal, — App. Div. —, 126 N. E. 254, 5 W. C. L. J. 716.

44. *White v. American Society for the Prevention of Cruelty to Animals.* — App. Div. —, (1920), 180 N. Y. Supp. 867, 5 W. C. L. J. 874.
Note: See same title in chapter on Accidents.

45. *Jewel Tea Co. v. Weber*, 132 Md. 178, 103 Atl. 476, 17 N. C. C. A. 252, 2 W. C. L. J. 87.

46. *Lindquest v. Holler*, 164 N. Y. Supp. 906, 178 App. Div. 317, 14 N. C. C. A. 432. *Stolte v. N. Y. State Sewer Pipe Co.*, 179 N. Y. App. Div. 949, 165 N. Y. S. 1114.

that the employee was suffering from a diseased condition which was aggravated by the accidental injury, and the death was proximately due to an injury arising out of the employment.⁴⁷

In an action to recover compensation for appendicitis alleged to have been caused by a severe shaking during the course of employment, it was held that the appendicitis was directly traceable to an accidental injury arising out of the employment.⁴⁸

An employee received an electric shock in the course of his employment, and a doctor testified that his subsequent death was due to septic peritonitis, caused by a lesion of the intestines resulting from the electric shock. But the commission held that the preponderance of the evidence tended to establish that the death was proximately caused by acute appendicitis, and therefore was not due to an accident arising out of and in the course of the employment.⁴⁹

A carpenter strained himself while lifting a radiator weighing 300 pounds. A physician testified that his subsequent death was due to the strain causing intestinal obstruction and appendicitis. It was held that the injury arose out of the employment.⁵⁰

§ 302. **Apoplexy.**—Claimant was engaged in placing heavy barrels in tiers in a cooler. After lifting a heavy barrel he complained of a severe pain in his head, and was seized with a stroke of apoplexy. It was contended that the injury suffered was not due to an accident arising out of the employment, but was the natural result of an inherent physical defect which manifested itself while claimant was pursuing his regular employment. The court held that claimant had sustained an accident, and that the accident arose out of and in the course of employment.⁵¹

An employee engaged in making bullion suffered from paralysis due to a cerebral hemorrhage and rupture of a small blood-

47. *Woods v. Wilson Sons & Co. Ltd.*, (1915), W. C. & Ins. Rep. 285, 8 B. W. C. C. 288, 10 N. C. C. A. 759.

48. *Enman v. Dalzil*, 50 Scot L. R. 143, 6 B. W. C. C. 900.

49. *Merriman v. Scovill Mfg. Co.*, 1 Conn. C. D. 596.

50. *McGuigan v. Maryland Casualty Co.*, 1 Mass. I. A. Bd. 438.

51. *Fowler v. Risedorf Bottling Co.*, and *In re Zurich General Accident & Liability Ins. Co., Ltd.*, 175 N. Y. App. Div. 224, 161 N. Y. S. 535, 14 N. C. C. A. 533.

vessel in the brain, brought on by long hours of work and excessive heat. It was contended by defendant that the bursting of the blood vessel was due to a clogging of the blood vessel which resulted from a diseased condition of the arteries. The applicant contended that it was due to a diseased condition of the arteries which would likely result in a bursting of the bloodvessel when subjected to the unusual risk of long hours of work and the excessive heat, and that claimant intended to do the long hours of work, but that in doing so he did not anticipate that his blood pressure would be so increased as to result in a rupture of a bloodvessel. The court held that the paralysis was due to the bursting of the bloodvessel, which bursting was caused by the unusual conditions under which claimant was compelled to work. Therefore the injury was proximately due to an accident arising out of and in the course of the employment.⁵²

A collier, who was performing heavy work, was suddenly siezed with apoplexy and died, and there was evidence that the arteries were in such a degenerated condition as to be likely to rupture at any time. The evidence was equally consistent with a finding that an accident did or did not happen and the court held that the onus of proving that an accident occurred in the course of and arising out of the employment had not been discharged.⁵³

An employee, whose duties included prompt action on his part in case of accidents, died from apoplexy while rushing to the scene of an accident to an employee who was not in the employment of his employer but who was performing work on his employer's premises. The court found that decedent's duties included his prompt attendance, in cases of any accident occurring in the works, either personally or by telephonic communication with a doctor. Therefore decedent did not put himself outside of the scope of his employment in going to the aid of the injured employee.⁵⁴

52. *La Veck v. Park Davis & Co.*, 190 Mich. 604, 157 N. W. 72, 12 N. C. C. A. 325.

53. *Barnabas v. Bersham Colliery Co.*, 103 L. T. 513, 55 Sol. J. 63, 4 B. W. C. C. 119, 7 N. C. C. A. 651.

54. *Aitken v. Finlayson, Bousfield & Co., Ltd.*, (1914), W. C. & Ins.

The applicant, a fireman employed on a steamer while in the tropics, went to work in a coal bunker where the heat was intense. Later he was found outside the bunker in a fit which according to the medical testimony resulted from a hemorrhage, but nothing was said to the effect that the hemorrhage was caused by an accident arising out of the employment. The arbitrator found that the hemorrhage did not result from an accident arising out of the employment, and, there being evidence to sustain his finding, it was not disturbed on appeal.⁵⁵

Where an employee, engaged in chasing thieves who were carrying off his employer's property, died from apoplexy brought on by the overexertion, it was held that the accident arose out of and in the course of his employment. "It is intimated in the report of the Chief Medical Examiner that had the decedent been in good physical condition he would not have died from the effects of exertion. Assuming this to be true from a medical standpoint, the fact remains that he did die, that the cause of his death was cerebral hemorrhage or apoplexy and that it was brought on by overexertion. While the decedent's physical condition may have been and doubtless was partly responsible for his death, it was the exertion and excitement engendered by the pursuit of the two thieves which really caused the decedent's death."⁵⁶

Apoplexy occurring in the absence of an accidental injury aggravating a pre-existing diseased condition or bringing on the apoplexy as a direct result of the injury, cannot be said to be a personal injury arising out of the employment.⁵⁷

A fireman fell from the cab of a locomotive and later died as the result of a hemorrhage of the brain. He had a predisposition to apoplexy. It was held that there was sufficient evidence to justify the board in finding that the death was due to the acciden-

Rep. 398, (1914), 2 Sc. L. T. 27, 51 Sc. L. R. 653, 7 B. W. C. C. 918, 10 N. C. C. A. 485.

55. Olson v. "Dorsett" (Owners of), (1913), W. C. & Ins. Rep. 604, 6 B. W. C. C. 658.

56. In re Fair Ohio Ind. Comm., (1914), 7 N. C. C. A. 651.

57. Ledoux v. Employer's Liab. Assur. Corp., 2 Mass. I. A. Bd. 493.

tal fall, and therefore due to an accident arising out of the employment.⁵⁸

§ 303. **Apprentice.**—A minor was employed as an apprentice to learn to run, an electric elevator. He had no license, so he was placed under the tutelage of a regular operator. After a weeks experience he operated the elevator alone and took the elevator to a certain floor, left it, and went on an errand. During his absence the elevator was moved, and when he returned he stepped through the door and fell, sustaining injuries. He settled with his employer and his settlement was approved by the district court. His father brought this action, regarding the settlement as a nullity, claiming that the relation of master and servant did not exist between the minor and the defendant, because the employment was illegal, in that the minor was prohibited by law from operating the elevator without a license. In affirming a judgment of dismissal, the court held that, as the minor was working as an apprentice, his employment was not illegal because he had no license, and on this question the court said: "This disposes of the case, though we may add in conclusion that section 34 of the compensation act (section 8230, G. S. 1913), by which the statute is made applicable to minors 'who are legally permitted to work under the law of this state,' was intended to exclude from the statute minors whose employment is prohibited by law. Section 3848, 3871, G. S. 1913. Plaintiff's son was not in this class. He lawfully could be employed in this sort of work, if qualified and possessing the necessary license."⁵⁹

Where an apprentice suffered a mutilation of his hand, and afterward secured work at reduced compensation, but was discharged for misconduct, the court refused to terminate compen-

58. *Peoria Railroad Terminal Co. v. Industrial Board*, 279 Ill. 352, 15 N. C. C. A. 632, 116 N. E. 651; *State ex rel Geo. D. Taylor & Sons v. District Court of Ramsey Co.* —Minn. —, (1920), 179 N. W. 217, 6, C. L. J. 698.

Note: For the Courts opinions pertaining to the accident phases of the foregoing cases see the same cases § 142, ante.

59. *Pettee v. Noyes*, 133 Minn. 109, 157 N. W. 995, 15 N. C. C. A. 727.

sation in the absence of a showing by the employer that other work was procurable.⁶⁰

A night watchman, who was paid for this work only, was allowed to study the firing of his employer's locomotive after work hours, in order that he might fit himself for a position of fireman when a vacancy would occur. It was customary to have men fit themselves in this way so that the company's own men would be qualified for advancement when vacancies occurred. It was held that the accident arose out of the employment.⁶¹

§ 304. **Asphyxiation.**—A night watchman, when intoxicated, neglected his duty and went into a washroom of the plant to sleep, lighted the gas heater, closed all openings and went to sleep. Later he was found asphyxiated. The court held that deceased's conduct placed him outside the scope of his employment, and that his death was not due to an accident arising out of the employment.⁶²

A night watchman, who was employed to guard gas trenches, was found dead in a place where the gas odor was very strong. The board, in the absence of any direct evidence as to the cause of the death, held that the natural inference, deducible from the facts shown, was that deceased came to his death through accidental asphyxiation. On appeal the court held that there was a presumption that deceased did not commit suicide. In the absence of evidence to the contrary, the showing that deceased was where he had a right to be raised a presumption that death was due to an accident arising out of the employment.⁶³

When an employee, whose duties required him to drain water from a pipe used in washing gas, was found dead at the place where he performed this work, and the medical evidence tended to show that death might ensue by a sudden inhalation of such

60. *Wilson v. Jackson Stores Ltd.*, (1905), 7 W. C. C. 122 C. A.

61. *Gardner v. Sierre Nevada Wood and Lbr. Co.*, 2 Cal. I. A. C. 856, 12 N. C. C. A. 666.

62. *Roebeling's Sons Co. v. Indus. Acc. Comm.*, 36 Cal. App. 10, 171 Pac. 987, 16 N. C. C. A. 891, 2 W. C. L. J. 38.

63. *Manziano v. Public Service Gas. Co.*, 92 N. J. L. 322, 105 Atl. 484, 18 N. C. C. A. 1025.

gas, the court held that the board was justified in finding that the accident arose out of the employment.⁶⁴

A laborer was found in a test room asphyxiated by gas. There was no evidence, either direct or circumstantial, as to why decedent entered the room. It was held that the burden of proving that the death was due to an accident arising out of and in the course of the employment had not been discharged.⁶⁵

An employee entered a wine vat, without testing for gas, and was asphyxiated. It was customary to test for gas before entering. There was no evidence as to whether or not a test had been made. The court held that the evidence was not sufficient to establish such willful misconduct on the part of deceased as to prevent the injury from being considered to have arisen out of the employment.⁶⁶

Where an engineer on board a ship, who was cautioned against the danger of asphyxiation resulting from having a fire in his cabin at night, did light one on a cold night and was suffocated thereby, it was held that the necessity of having a fire on board the ship was not as great as the hazard such action would expose the engineer to, and that it was unreasonable conduct on his part to disregard the instructions, therefore the accident did not arise out of the employment.⁶⁷

Where a traveling salesman was asphyxiated by escaping gas in the hotel while asleep, his death was due to an ordinary hazard of living, and was not due to an accident arising out of and in the course of the employment.⁶⁸

64. *Holnagle v. Lansing Fuel and Gas. Co.*, 200 Mich. 132, 166 N. W. 843, 1 W. C. L. J. 1010, 17 N. C. C. A. 788.

65. *Gray v. Sopwith Aviation Co., Ltd.*, (1918), W. C. & Ins. Rep. 237 119 L. T. R. 194, 17 N. C. C. A. 939.

66. *United States Fidelity & Guarantee Co. v. Indus. Acc. Comm. of Cal.*, 174 Cal. 616, 163 Pac. 1013, 15 N. C. C. A. 149, 1 W. C. L. J. 215.

67. *Edmunds v. S. S. Peterson*, 28 T. L. R. 18, 5 B. W. C. C. 157.

68. *Reed v. Booth & Platt Co.*, 1 Conn. Comp. Dec. 121; *Kehoe v. Consolidated Telegraph & Elect. Subway Co.*, 176 N. Y. App. Div. 84, 165 N. Y. S. 481, 16 N. C. C. A. 640; *Kass v. Hirschberg, Schultz & Co.*, 191 N. Y. App. Div. 300, (1920), 181 N. Y. S. 35, 5 W. C. L. J. 879.

In the same kind of case the New York Court said: "The act provides (section 3, subd. 7), that 'injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment, and surely the accident here under consideration did not arise out of the employment. The accident arose out of the negligence, not of the master, but of a third party. It was not a whit different than an accident of the same character which might have happened at the decedent's own home after his days work was done. While the statute as amended by chapter 622 of the laws of 1916, has enlarged the liability of the employers, it has not had the effect of insuring their employees generally against those accidents which are common to mankind; It is only as to accidents 'arising out of and in the course of employment.' Matter of Dose, *Moehle Lithographic Co.*, 221 N. Y. 401, 405, 117 N. E. 616.

"The act does not afford compensation for injuries or misfortunes which merely are contemporaneous or coincident with the employment, or collateral to it. Not every diseased person, suffering a misfortune while at work for an employer, is entitled to compensation. The personal injury must be the result of an employment and flow from it as the inducing proximate cause. The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by the facts before the right to compensation springs into being. *Madden's Case*, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000; *Matter of Alpert v. Powers*, 223 N. Y. 97, 101, 102, 119 N. E. 229. The accident here under consideration had no relation to the employment, the decedent was not doing anything for the employer at the time of the accident, and there is no ground for this award."⁶⁹

§ 305. **Assisting A Fellow Employee, Employee of Another Employer or A Stranger.**—Where a janitress in a hotel undertook to clean a light well, which was part of the duties of another janitor, and was injured by a fall which resulted in her death, the

69. *Kass v. Hirschberg, Schultz & Co.*, 191 App. Div. 300, (1920), 181 N. Y. Supp. 35, 5 W. C. L. J. 879.

court held that in attempting to clean the light well, which was an undertaking merely to assist another employee, who was ill, and a very dangerous task for a woman to perform, deceased placed herself outside the scope of her employment, and was not injured by an accident arising out of her employment, even though the work attempted would have been in the interest of the employer.⁷⁰

An employee lived in a house rented from his employer. His wife conducted a restaurant for the defendant in its office building. She requested her husband to carry a basket of linen from the house to the restaurant, and while going from his residence to the street he came in contact with a live wire and was killed. Plaintiff received a judgment in an action at law. On appeal it was contended that deceased was employed to assist his wife and, therefore, in carrying the linen he was doing his master's work. Deceased's duties were those of a janitor in the building. The evidence was conflicting as to whether deceased's contract of employment included the assisting of his wife in her work. The court found that deceased was not in the course of his employment, and therefore the controversy did not come under the compensation act.⁷¹

A load of coal became mired, and the team hitched thereto was unable to remove it. The driver requested plaintiff, a passerby, to assist in removing it and while so doing he was injured. It was held that the driver had implied authority to employ someone for this temporary purpose, and the plaintiff became the employee of the coal company for the purpose of rendering this assistance and was entitled to the protection of the Minnesota Workmen's Compensation Act.⁷²

70. *Williamson v. Indus. Acc. Comm. of Cal.*, 177 Cal. 715, 171 Pac. 797, 16 N. C. C. A. 884.

71. *Murphy v. Ludlum Steel Co.*, 182, App. Div. 139, 169 N. Y. S. 781, 16 N. C. C. A. 901, 1 W. C. L. J. 1122.

72. *State v. Ramsey County*, 138 Minn. 416, 165 N. W. 268, 1 W. C. L. J. 642; *In re Levi Chance*, 3rd A. R. U. S. C. C. 166; *In re Geo. Boller*, 3rd A. R. U. S. C. C. 167.

An employee was injured, after receiving his wages, while assisting in placing a threshing machine on the road after the completion of a job. The evidence tended to show that it was customary for the employees who followed the machine from job to job to assist in placing the machine out on the highway after finishing a job. The court held that applicant's contract of service anticipated a compliance with this established custom, and therefore the accident arose out of his employment.⁷³

Where a carpenter employee in a laundry was killed while performing work for one of the individual stockholders, according to a usual custom of the laundry, and at the time of his death he was acting under the express directions of the officers of the corporation, it was held that the accident arose out of and in the course of the employment.⁷⁴

Where an employee of a corporation, who was loaned to a director to do some work for the director on his own premise and at his direction and supervision, was injured while performing this work, it was held that the injury did not arise out of and in the course of the employment.⁷⁵

Where an employee was injured while making deliveries of cigars for the accommodation of his employer after work hours, it was held that the injury arose out of the employment. The court said: "The employee's act was not mere friendship, it was the relation of employer and employee, that led one to request the service and the other to render it. If such service is not incidental to the employment within the meaning of the statute, loyalty and helpfulness have earned a poor reward."⁷⁶

Two butcher boys were employed on a wagon, and one fell off and was injured. A bystander volunteered to ride home on the wagon in order to assist in caring for the injured boy. On the way home the volunteer bystander fell off and was injured, and

73. *Newson v. Burstall*, (1915), W. C. & Ins. Rep. 16, 15 N. C. C. A. 218.

74. *English v. Cain*, 2 Cal. I. A. C. 399, 11 N. C. C. A. 376.

75. *In re Jones*, 1 Bull. Ohio Ind. Comm. 57; *Carnahan v. Mailometer Co.*, 201 Mich. 173, 167 N. W. 9, 1 W. C. L. J. 1045.

76. *Grieb v. Hammerle*, 181 N. Y. App. Div. 911, 118 N. E. 805, 222 N. Y. 382, 1 W. C. L. J. 846.

sought to hold the master liable on the ground of implied authority of the driver to hire a person in the case of an emergency. The court held that there was no such implied authority, and dismissed the case.⁷⁷

Where an employee was injured while posting a letter for his employer, although the regular duties of the employee did not include such services, it was held that the accident arose out of the employment.⁷⁸

Deceased, a chief clerk in the freight auditing department of a railroad office, was injured while enroute to another office to assist in straightening out the books of the latter office. On the way an intending passenger was injured and deceased alighted to render assistance. When the injured party was cared for deceased attempted to board the moving train and fell, sustaining injuries resulting in his death. In reversing an award for compensation, and holding that the accident did not arise out of deceased's employment, the court said: "The transcript of evidence will be searched in vain to discover one word arising to the dignity of evidence, to establish the statement that the deceased alighted from the train 'to be available in case his services should be useful,' or that if he did that it was any part of his express or implied duties as an employee of the defendant to do so. The testimony of the president and general manager of the road was taken at great length. That testimony is positive and uncontradicted, that there was no rule, written or unwritten, and no custom, whereby employees riding upon a train other than and outside of the train crew were called upon or expected to enter into an investigation in case of an accident, to secure the names of witnesses, or to perform any like service."⁷⁹

An employee, whose duties were to shovel gravel, exchanged work with a teamster who was out in the rain and had become

77. *Houghton v. Pilkington*, 107 L. T. R. 235.

78. *Wooley v. Geneva Cutlery Co.*, 181 N. Y. App. Div. 909, 167 N. Y. S. 1134; *Swanick v. Saratoga Milling & Grain Co.*, 181 N. Y. App. Div. 911, 167 N. Y. S. 1129 (N. Y. Bull. for June, 1918).

79. *Northwestern Pac. R. Co. v. Indus. Acc. Comm.*, 174 Cal. 297, 153 Pac. 1000, 15 N. C. C. A. 219.

wet. While driving the gravel wagon the team ran away, threw applicant from the wagon and injured him. The board found that there was a custom among the employees to exchange work and awarded compensation. The court on appeal held that in exchanging work applicant clearly placed himself outside the scope of his employment, unless such custom was known and assented to by the employer. The court further found that there was no evidence to justify a finding that the custom existed to the knowledge of the employer, and therefore applicant's injury did not arise out of the employment.⁸⁰

A company employed a night watchman to look after an engine, to keep it alive, and have it ready for the workmen in the morning. The superintendant took the engine on a certain night and relieved the watchman. Another watchman was employed to care for a steam shovel, and on this night he requested deceased to relieve him while he visited his folks. Deceased complied with the request and was murdered while on watch. The evidence tended to show that deceased was acting without permission on this occasion, but that such permission would have been granted if applied for. The court, in annulling an award, said that deceased was acting without even the implied authority of his employer, assuming new duties when there was no emergency for doing so, and going to a place where he had no right to be. Therefore "our conclusion is that the injury which caused the death of deceased did not arise out of nor in the course of his employment. Indeed, the case presented is precisely the same as though deceased had at the close of his night's labor repaired to his home and while awaiting a return of the time to assume his duties he had been murdered."⁸¹

A general laborer about a canning plant sustained injuries which resulted in his death, when he responded to an elevator operator's call for assistance. Deceased's duties necessitated that he operate the elevator himself at times, but at the time of

80. *Modoc County v Indus. Acc. Comm. of Cal.*, 32 Cal. App. 548, 163 Pac. 685, 15 N. C. C. A. 289.

81. *Robert Sherer and Co. v. Indus. Acc. Comm.*, 175 Cal. 615, 166 Pac. 318, 15 N. C. C. A. 281.

the accident another person was in charge of the elevator. In affirming an award, the court said: "It is doubtless true that the facts would not support a judgment under the common law, nor under the Employers' Liability Act. * * * (Labor Law (Consol. L. c. 31; L. 1909, c. 36) art. 14, as amended by L. 1910, c. 352.); but the workmen's compensation act contemplates charging the industrial life of the state with the burden of accidents to such industry, within the limits fixed by the act, and we are not prepared to hold that a common laborer is not in 'the course of his employment' when he steps aside from his immediate employment to give an incidental aid to a fellow employee in the operation of a freight elevator, which is operated in common by all of the employees. It does not appear that the elevator had been broken or damaged; merely that it had ceased to respond to the operating cables, and to say that a man who is at work near the point may not lend a hand in starting this elevator without sacrificing his rights under the law is too narrow a construction to apply in the construction of the statute. If the decedent had himself been using the elevator as Kelley was doing—and this was among his duties—there would have been no doubt of his being protected while trying to start the elevator, even though Hills Bros. Company (defendant) had employed an engineer to make repairs, and no good reason suggests itself why he might not have left his boiling pots for a few moments to aid a fellow laborer in an effort to start this same elevator."⁸²

Where an employee was caught in a cave-in and killed when he sought to rescue an employee of another contractor from danger, it was held that the accident arose out of the employment.⁸³

Where an employee attempted to rescue fellow employee's from an accident where many were killed, and became insane as a result of the mental and emotional shock, the commission found

82. *Martucci v. Hills Bros. Co.*, 171 N. Y. App. Div. 370, 156 N. Y. S. 833, 15 N. C. C. A. 282.

83. *Mihaica v. Mlagenovich & Gillespie*, 1 Cal. Ind. Acc. Comm. Dec., (1914), 174, 10 N. C. C. A. 477.

that the insanity was due to an accident arising out of the employment.⁸⁴

A laborer in a brick supply company responded to a fellow employee's request for assistance in placing a derailed car back on the track, and was injured while so doing. No one in authority commanded applicant to assist in the undertaking, and there was no one present to supervise the work. It was held that the accident arose out of and in the course of the employment.⁸⁵

Deceased, a bobbin stripper, left his machine to remove waste that had accumulated on another's machine, and in doing so sustained the injuries that resulted in his death. The board awarded compensation, stated that it disbelieved all the testimony as to the circumstances surrounding the accident, and found that deceased was caught in a belt while on his way to the toilet. On appeal this finding was reversed, the court holding that the board could not, in the absence of evidence, infer that the belt suddenly left the pulley and lashed against deceased as he passed on his way to the toilet, and therefore there was no evidence to sustain the board's finding that the accident arose out of the employment.⁸⁶

A number of employees of different employers were all delivering bags of glucose at one warehouse. A custom existed that where a number of wagons arrived at one time, all the employees would join in assisting to unload and store away the bags, although the employer's only agreed to deliver the bags to the consignee's tackle. The carters received compensation from the warehouse men for helping to store the bags. Claimant was injured while helping to unload the cart of another. It was held that the accident did not arise out of the employment.⁸⁷

An employee, while on an errand for his employer, stopped to render assistance to a horse which had been overcome by the heat. While doing so the horse fell upon and broke the leg of the em-

84. *Reich v. City of Imperial*, 1 Cal. I. A. C. D., (1914), 337, 10 N. C. C. A. 479; *Waters v. Wm. J. Taylor & Co.*, 218 N. Y. 248, 112 N. E. 727.

85. *Ferguson v. Brick & Supplies*, (1914), 7 B. W. C. C. 1054.

86. *In re Dube*, 226 Mass. 591, 116 N. E. 234, 15 N. C. C. A. 283.

87. *Wm. Sinclair v. Carlton*, (1914), Sc. Ct. of Sess. 7 B. W. C. C. 937.

ployee. It was held that the injury was not sustained in the course of the employment.⁸⁸

Where a laborer was injured while assisting another employee to replace a belt on a pulley, it being none of the special duties for which applicant was engaged, but under the facts found such work was not truly outside the scope of his employment, the court held that the act of the workman was a natural and helpful intervention in the conduct of his master's business, and accordingly the accident arose out of and in the course of the employment.⁸⁹

An employee offered to assist his superior in the performance of duties which were clearly the duties of the superiors, and his offer was accepted. He was injured while so doing. The court said that the voluntary offer of a servant to make himself useful in a matter not covered by an express command, where such offer is accepted by the superior, although not by an approval expressed in words, it cannot be said that, as a matter of law, the servant placed himself outside the scope of his employment.⁹⁰

Where a carpenter became involved in a fight over the protection of his property, and his brother, who was employed by him, went to his assistance and while he was keeping others off was injured, it was held that the injury did not arise out of the employment, no matter how commendable his actions in the protection of his brother might have been.⁹¹

Where an assistant cutter in a shirt waist factory was fatally wounded by strikers while trying to save his employer and other employees from injury, his injury arose out of and in the course of the employment.⁹²

88. *In re Verkamp*, 1 Bull. Ohio Ind. Comm. 123, 12 N. C. C. A. 907.

89. *Menzies v. McQuibban*, 37 Sc. L. R. 526, (1900), 10 N. C. C. A. 480.

90. *Miner v. Franklin County Tel. Co.*, 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195.

91. *Clark v. Clark*, 189 Mich. 652, 155 N. W. 507, 11 N. C. C. A. 240; *Collins v. Collins*, (1907), 2 Ir. Rep. 104, 6 N. C. C. A. 1025; *In re G. M. Armstead*, Op. Sol. Dep. C. & L. pg. 240.

92. *Baum v. Indus. Comm.*, 288 Ill. 516, 123 N. E. 625, 4 W. C. L. J. 357, 18 N. C. C. A. 1053.

A master mechanic who was informed that one of his employees was attempting to pull a truck out of a ditch, went to help the employee, and while on the way was struck by a train and killed. It was held that the death arose out of the employment.⁹³

A truck driver was putting wood into a building of a customer by means of a hand elevator. Something went wrong with the elevator and an employee of the customer endeavored to fix it, requesting claimant's assistance. While assisting in the fixing of the elevator a splinter flew and struck him in the eye. It was held that the accident arose out of the employment.⁹⁴

A driver of a milk wagon went to the assistance of another driver working for a different employer, when a horse of the latter had fallen. While assisting in getting the horse on his feet, the fallen horse kicked and injured him. There was a well established custom, known to the employers, that the milk drivers would go to the assistance of one another. It was held that the accident arose out of and in the course of the employment.⁹⁵

Applicant, a steel dresser, was instructed by his superior to assist another employee, should she have any trouble with her machine. She called upon applicant to do some work upon her machine and while adjusting a nut he fell into the saw. The court held that the accident arose out of applicant's employment, for he was doing the very thing he was supposed to do, and although he may have been negligent or reckless, his conduct was not such as to disentitle him to compensation for the injury sustained.⁹⁶

A forest ranger, shot and killed while assisting a sheriff. upon request, to arrest a deserter from the United State Army, was awarded compensation.⁹⁷

93. *In re Pennington*, Ohio Ind. Comm., (1915), 12 N. C. C. A. 249.

94. *Kaspar v. Clark & Wilkins Co.*, (1916), 7, N. Y. St. Dep. Rep. 454.

95. *Niles v. Walnut Grove Creamery Co.*, (1916), 3 Cal. I. A. C. 305.

96. *Cars v. Vickers, Ltd.*, 120 L. T. R. 465, (1919), 18 N. C. C. A. 1031;

97. *In re Rudolph E. Mellenthin*, 3rd A. R. U. S. C. C. 167.

Note: For further cases on this subject see "Volunteers' Emergencies," and "Accidents to employees whose conduct while performing duties for the master places them outside the scope of employment."

The court in holding that an accident did not arise out of the employment said: "Defendant was an employer and was under the Compensation Act and was engaged in the conduct of his business. Plaintiff and his employer were likewise under the Compensation Act. Plaintiff was driving an automobile belonging to his employer. The automobile had been assigned to another employee of the same employer, but one doing business in other territory, and was being taken by plaintiff from a railroad station at the request of this fellow employee and solely as an accommodation to him. The evidence sustains a finding that the accident did not arise in the course of plaintiff's employment and that the case is not within the third party provision of the Minnesota Compensation Act."⁹⁸

Where one of two brothers who were working together was directed to fill a tank with wax from an oil room, the death of the other while assisting without having been expressly ordered to do so, was held to have arisen out of the employment.⁹⁹

§ 306. **Bite of Animals.**—An employee was bitten by a factory watch dog while performing his duties, and brought an action at law. A judgment in plaintiff's favor was reversed, because it did not appear clearly that the compensation act was not applicable. After remarking that because of the lapse of time it would be presumed that the dog remained on the premises with the permission of the defendant, the court said: "There is no doubt that the plaintiff was engaged in performing the duties of his employment at the time he was bitten. The presence of the dog, with defendant's implied knowledge and consent, was one of the physical conditions of the plant under which the defendant required the plaintiff to perform his duties. The mere fact that the direct cause of the injury was animate, rather than inanimate, does not alter the result; nor in this view can I see any force in the suggestion that the dog was not especially kept as a watchdog, or for some similar purpose (though I think the proof showed that it was so employed.) The right of the plaintiff to a recovery does not,

98. *Gibbs v. Almstrom*, — Minn. —, (1920), 176 N. W. 173, 5 W. C. L. J. 541.

99. *Milne v. Sanders*, — Tenn. —, (1921) 228 S. W. 702.

on any theory of which I am made aware, depend upon the comparative usefulness to the employer's business of the immediate cause of the injury.'"¹

A workman, while eating lunch, was bitten by a cat, which was kept about the stables. The bite resulted in blood poisoning. It was held that the accident arose out of the employment.²

Where a workman while attending to his duties was bitten by a mad dog, it was held that the injury occurred during the course of the employment, and compensation was awarded.³

Claimant, while returning to work from dinner, was bitten by a mad dog. It was held that the accident did not arise out of the employment.⁴

Where a brewery employee, whose duties included delivering beer to customer's homes, was bitten by a bulldog while making a delivery, it was held that he had sustained an injury arising out of the employment.⁵

Injury by dog bite, while one employed to deliver packages is making a delayed delivery in the morning, while on his way between his home and the place where the vehicle utilized by him in his work is stored, to procure it for his day's work, is held to arise out of the employment within the meaning of the Utah Workmen's Compensation Act.⁶

§ 307. Bites and Stings From Insects and Reptiles.—An employee suffered from infection following insect bites. About two years later he died from heart trouble and septicæmia. Applicant contended that the death was due to the infection following the insect bites. Medical testimony was to the effect that death was not caused by such infection, as the effect of the insect stings had passed off very rapidly, since the infection penetrated no deeper

1. *Brone v. Brambach Piano Co.*, 101 N. Y. Misc. 669, 167 N. Y. S. 933, 15 N. C. C. A. 229; *Hapelman v. Poole*, (1908), 25 T. L. R. 155, 2 B. W. C. C. 48.

2. *Rowland v. Wright*, (1908), 1 B. W. C. C. 192.

3. *Re E. E. Bailey*, Op. Sol. Dep. C. & L. p. 232.

4. *Re Alexander Green*, Op. Sol. Dep. C. & L. p. 223.

5. *Re Wm. Miller*, 1 Bull. Ohio Ind. Com. 789.

6. *Chandler v. Indus. Comm.*, — Utah —, 184 Pac. 1020.

than the surface of the body. The board found that the death was not due to an accident arising out of the employment.⁷

Bites by poisonous insects, reptiles, and animals are industrial accidents only where the injury arises out of and in the course of the employment, and the nature of the employment exposes the employee to a greater hazard of being bitten because of the nature of the employment. So, where a woman employed in a cannery was bitten by a spider during the noon hour while she was eating lunch, it could not be held that she sustained an injury arising out of the employment, in the absence of evidence that her employment exposed her to a risk, of being bitten, greater than the risk common to the public at large.⁸

An injury to a workman, who was stung by a wasp while driving a threshing machine, and as a result thereof died from blood poisoning, did not arise out of the employment, but was a risk to which the employee, as well as all others, were exposed at all times.⁹

A lady's maid was sewing in a room when a cockshafer flew into the room. In trying to drive it away, she injured her eye. It was held that the accident did not arise out of the employment.¹⁰

A "Spieler" for an amusement show was bitten by a gila monster that he was exhibiting to induce a crowd to patronize the show. It was held that the accident arose out of and in the course of the employment.¹¹

§ 308. **Bone Felon.**—An employee developed a bone felon while putting strips in metal frames by the use of pliers. The felon

7. *Campbell v. Aetna Life Ins. Co.*, 2 Mass. Wkmn. Comp. Cas. 701, 11 N. C. C. A. 507.

8. *Goodwin v. Libby McNeill & Libby*, 2 Cal. I. A. C. D., (1915), 211, 10 N. C. C. A. 275; *Sterling v. J. B. Inderredian Co.*, 2 Cal. I. A. C. D., (1915), 172, 10 N. C. C. A. 275.

9. *Amys v. Barton*, (1912), 1 K. B. 40, 3 N. C. C. A. 281, [1912], W. C. & Ins. Rep. 22, 5 B. W. C. C. 117.

10. *Craske v. Wigan*, 2 B. W. C. C. 35, (1909).

11. *Merritt v. Clark & Snow*, 2 Cal. Ind. Acc. Com. 910, 12 N. C. C. A. 474.

was a gradual development from the continuous use of the pliers.

In denying that the claimant's injury was due to an accident arising out of the employment, the court said: "In the instant case the workman was doing the work he was employed to do, had done for nearly six years, in the way he was employed to do it, and in the way it had been done by him for a long time. That the work done by a laborer one day is harder than on other days is not an accident within the meaning of the act. There is no evidence in the record of the intervention of any untoward or accidental happening producing the injury. There was no blow or sudden strain. The felon was developed by the continuous use of the pliers."¹²

§ 309. **Bright's Disease.** —An employee was injured, and later developed diabetes. There was no evidence that claimant was suffering from the disease prior to the accident, but on the contrary the evidence showed that he was a strong healthy man. The board found that the disease was due to the accidental injury and awarded compensation. On appeal the court held that the finding of the board was not based on mere conjecture, in view of the evidence that prior to the accident claimant was a strong healthy man.¹³

An employee was injured, and five days later developed acute Bright's disease, but there was no blood in the urine or any other indication of physical injury. It was held that there was no evidence that the injury was the cause of the Bright's disease, and further the medical testimony was to the effect that acute Bright's disease is probably never due to traumatic origin. Therefore the disease was not due to an accidental injury arising out of the employment.¹⁴

An employee suffered an accidental strain while pulling burlap, and later developed Bright's disease. The evidence showed that

12. *Perkins v. Jackson Cushion Spring Co.*, 206 Mich. 98, (1919), 172 N. W. 374.

13. *Balzer v. Saginaw Beef Co.*, 199 Mich. 374, 165 N. W. 758, 15 N. C. C. A. 645.

14. *Husvick v. Simms*, 1 Cal. I. A. C. D. 266.

claimant was suffering from all the symptoms of Bright's disease, including a diseased condition of the heart, lungs, and kidneys which had no causal connection with the injury. It was held that the evidence was insufficient to show that the disease was caused by an injury arising out of the employment.¹⁵

A ship's cook, who was suffering from Bright's disease necessitating frequent micturition, was last seen in the ship's galleys, and would have to step outside to reach a urinal upon a deck guarded by a railing. The seas were rough. It was held that there was no evidence sufficient to prove that his disappearance was due to an accident arising out of the employment.¹⁶

An employee was furnished with boots by his employer, and the boots produced an abrasion upon his heel. Germs entered through this abrasion and infection followed, causing Bright's disease. It was held that the infection was due to the accidental injury arising out of the employment.¹⁷

§ 310. **Burns.**—An employee suffered an injury to his hand in the course of his employment, and had it bandaged by an agent of the employer, who poured turpentine over the bandage. Later, when the employee endeavored to light a cigarette, the saturated bandage became ignited and his hand was severely burned. The court held that such acts as are necessary to life, comfort, and convenience of the workman while at work, though personal to himself, are incidental to the service and an injury sustained while performing any of them arises out of the employment.¹⁸

Where a guard was severely burned in a wreck, which occurred while he was riding on his employer's train for his own purposes during his off hours, it was held that the accident did not arise out of and in the course of the employment.¹⁹

An employee in a hospital sustained severe burns when he was unable to escape from a room after a fire had broken out, because

15. *Lima v. Aetna Life Insurance Co.*, 2 Mass. W. C. Cas. 800.

16. *Burwash v. Leyland & Co., Ltd.*, (1912), 5 B. W. C. C. 663, C. A.

17. *Wheadon v. Red River Lbr. Co.*, 1 Cal. I. A. C. (Part II) 640.

18. *Whiting Mead Commercial Co. v. Indus. Acc. Comm.*, 178 Cal. 505, 173 Pac. 1105, 2 W. C. L. J. 746.

19. *Pierson v. Interborough Rapid Transit Co.*, 102 N. Y. Misc. 130, 168 N. Y. S. 425, 16 N. C. C. A. 885.

of the alleged serious and wilful misconduct of the superintendant in charge, and claimed double compensation. The claim for double compensation was not allowed because of the failure to sustain the allegation of wilful misconduct. Compensation for the actual disability was awarded.²⁰

Where a stenographer was burned to death, when her means of escape was cut off by a fire on the lower floor, it was held that her death was caused by an accident arising out of and in the course of the employment.²¹

An employee fainted after a quarrel with her employer. Other employees threw ammonia in her face, in the mistaken belief that it was water, and it resulted in burns and ulcers. It was held that the accident arose out of the employment.²²

Where a carpenter, who was subject to dizzy spells, suffered from an attack of dizziness while cooking lunch, and as a result, laid his hand upon a hot stove, it cannot be said that the injury was due to an accident arising out of the employment.²³

An employee burned as the result of carrying matches where there was no express provision against such practice, although smoking was prohibited, cannot, as a matter of law, be said to be without the protection of the act.²⁴

§ 311. **Cancer.**—A workman sustained an injury to his hand and blood poison followed. Two years later he sought compensation for a cancer on his penis which, he contended was caused by his impaired physical condition following the injury to the hand. The medical testimony failed to show any causal connection between the injury to the hand and the cancer which developed two years later. Therefore the injury did not arise out of the employment.²⁵

20. *Keane v. Employers Liab. Assur. Corp., Ltd.*, 1 Mass. W. C. C. 193, (1913), 11 N. C. C. A. 558.

21. *Newark Hair, etc. Co. v. Feldman*, 89 N. J. L. 504, 99 Atl. 602.

22. *Saenger v. Locke*, (1916), 9 N. Y. St. Dep. Rep. 330.

23. *Neuberger v. Third Ave. Ry. Co.*, 183 N. Y. S. 348, (1920), 6 W. C. L. J. 485.

24. *Steel Sales Corp. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 698, 6 W. C. L. J. 303.

25. *Ortner v. Zenith Carburetor Co.*, (Mich.), (1919), 175 N. W. 122, 5 W. C. L. J. 273.

Claimant fell in the course of his employment and broke his thigh. The board found that the breaking of the bone and the subsequent fall was due to a cancerous infection and therefore did not arise out of the employment. On appeal the court said: "The evidence is wholly undisputed that the claimant had a 'pathological fracture.' This is his own admission. Upon his being taken to the Roosevelt Hospital it was found that he had a osteosarcoma, popularly known as cancer of the bone, at the point of the fracture, and there is no dispute in the evidence that the amputation was made, not because of the fracture, but because of the disease. Dr. Gillespie testified, and there was no contradiction, that there was no visible injury to the outside of the leg that he could find, and that 'the leg was amputated because the growth was malignant,' that if the accident had occurred, as described, and there had been no sarcoma at that point, no amputation would have been necessary. The diagnosis was made immediately after the accident, and the operation took place within the eight days of the diagnosis, and the undisputed evidence is to the effect that the operation was for the purpose of curing the diseased condition of the leg, not because of the fracture. Indeed, the fair inference from the evidence is that the fracture was the result of the disease rather than of the accident, though it was inferentially admitted that the false step hastened the break. But the loss of the leg was clearly due to the diseased condition, that disease was the only justification for the amputation, and the disease concedely existed before the accident and was, doubtless, the underlying cause of the fracture, for it is hardly conceivable that such a fall as the claimant describes could have resulted in a breaking of a thigh bone at its lower extremity. It is not shown that the claimant was bruised in any way; he apparently fell forward down an incline of about 30 degrees and rolled to the bottom, with no other injury than the breaking of the diseased bone, and to charge this disease to the industry, simply because it became manifest by reason of this inconsequential fall, is an abuse of the purpose of the Workmen's Compensation Law, which

sought to insure against the inherent risks of certain classes of industry.²⁶

An employee sustained a fall in the course of his employment, and a sarcoma or cancer appeared on his left clavicle a few hours later. The medical testimony was conflicting as to the possibility of a cancer being caused by the injury and making its appearance the same day of the injury. The board found that the cancer was due to the fall, and on appeal the court held that, in view of the conflicting testimony, the finding would not be disturbed.²⁷

Where an employee suffered a blow on the head, which drove a tooth through his tongue, and the wound later developed into a cancer, causing his death, the court denied compensation because of a failure to give notice of the injury.²⁸

Where a driver was thrown from a wagon, and accelerated an unknown cancer of the stomach causing his death, it was held that the death was due to an accident arising out of the employment.²⁹

Where an employee fell astride of a hot pipe, and the burns he sustained developed into a cancer necessitating an operation, compensation was awarded.³⁰

A falling chunk of coal struck a fireman on the leg just over a sarcoma of the bone, and made an amputation of the leg necessary. The commission allowed compensation on the ground that the blow aggravated a cancerous condition. The appellate court reversed the award on the ground that notice of the accident was not given.³¹

An employee worked in a browning room where fumes of obnoxious, poisonous gases were given off. He developed cancer of the

26. *Brady v. Holbrook, Cabot & Rollins Corp.*, 178 N. Y. S. 504, (1919), 5 W. C. L. J. 91, 189 App. Div. 405.

27. *Santa Ana Sugar Co. of Santa Ana v. Indus. Acc. Comm.*, 35 Cal. App. 652, 170 Pac. 630, 17 N. C. C. A. 877, 1 W. C. L. J. 745.

28. *Potter v. John Welsh & Sons, Ltd.*, (1914), 3 K. B. 1020, W. C. & Ins. Rep. 607, 7 B. W. C. C. 738, 9 N. C. C. A. 1033.

29. *Blatt v. Schonberger & Noble*, 176 N. Y. App. Div. 924, 162 N. Y. S. 1111.

30. *Richardson v. Builders' Exchange Assn.*, 179 N. Y. App. Div. 949, 165 N. Y. S. 1109.

31. *Prokopiak v. Buffalo Gas Co.*, 176 App. Div. 128, 162 N. Y. S. 288.

liver and died. It was contended that the cancerous condition was brought about by the poisonous fumes. The medical experts denied that this was the cause of the cancer, and that the conditions necessary for the bringing on of cancer were not present. It was held that the burden of showing a causal connection between the conditions of employment and the cancerous condition had not been discharged.³²

Deceased was engaged in furrowing certain posts, pushing them against the knives by pressing his abdomen forcibly against them. After working in this manner for some time he sat down, and was evidently in great pain. He died three days later from hemorrhages, which defendant claimed were produced by a rupture of an internal cancer. The court held that, though deceased was suffering from a cancer, still the cause of the rupture was due to the unusual pressure, and hence the death was due to an accident arising out of the employment.³³

A dock laborer was incapacitated for three months by a blow on the back. He underwent two operations for cancers of the kidney, and died in the second operation. The testimony regarding the origin of the cancer was conflicting. The court held that there was sufficient testimony to support a finding that the cancer was due to an injury arising out of the employment.³⁴

A butcher's canvasser was injured when the bicycle he was riding skidded, and he fell. Two months later he was found to be suffering from a cancer, and the medical testimony was to the effect that the disease was brought on by the accident. It was held that the cancer arose out of the employment.³⁵

An employee punctured his tongue with some tacks he was holding in his mouth while putting up shades. A cancer developed on his tongue, necessitating an operation, and he died under the

32. *Alton v. Hopkins & Allen Arms Co.*, 1 Conn. C. C. D. 378; *Marcontonio v. The Charles Francis Press*, N. Y. Bull. Vol. 1, No. 12, pg. 16.

33. *Voorhes v. Smith Schoonmaker Co.*, 86 N. J. L. 500, 92 Atl. 280, *Rose v. City of Los Angeles*, 2 Cal. I. A. C. D. 551.

34. *Lewis v. Port of London Authority*, (1914), 7 B. W. C. C. 577 C. A.

35. *Howard v. Rowsell & Mathews*, (1914), 7 B. W. C. C. 552.

anæsthetic. It was held that his death was due to an injury arising out of the employment.³⁶

§ 312. **Carbuncle.**—Where an employee who was suffering from a carbuncle, received an injury to the carbuncle before it had ripened, and thereby caused septicæmia and disability, it was held that the disability was due to an accident arising out of the employment.³⁷

It was claimed that a carbuncle which affected the spine came from a blow on the back. Medical testimony was to the effect that carbuncles are not associated with germs introduced from without, but generally, if not always, come from internal poisoning accompanying a run down condition, as was the case of this man. It was held that the claimant had not discharged the onus of proving that the carbuncle was caused by an accidental injury arising out of the employment.³⁸

§ 313. **Charity Workers and Persons Seeking Relief From Charity Injured.**—A blind pauper suffered a crushed hand, necessitating amputation of the three middle fingers, while working in the industrial department of a charitable institution. The institution depended upon charitable aid for its upkeep. The workmen were divided into three classes and paid for their labor. The arbitrator held that since the applicant was in receipt of charitable aid, he could not be said to be a workman. Upon appeal the court of sessions held that he was a workman within the meaning of the act, and suffered an injury arising out of his employment.³⁹

36. *Cramer v. Littell*, 38 N. J. L. J. 82.

37. *Caine v. Greenhut & Co.*, 181 N. Y. App. Div. 907, 167 N. Y. S. 1091; *Cutter v. Snavalin*, S. D. R. Vol. 14, p. 547, Bull. Vol. 2, pg. 152; *Whalen v. N. Y. & Cuban Mail S. S. Co.*, Bull. of Gen. Contractors Association, vol. 8, pg. 64.

38. *Redmond v. Winchester Repeating Arms Co.*, 2 Conn. C. D., Part 1, pg. 118; *Throm v. Estate of Mally*, 2 Conn. C. D., Part 1, pg. 121.

39. *MacGillivray v. The Northern Counties Institute for the Blind*, 1911 Ct. of Sess. Cas. 897, 4 B. W. C. C. 429, 48 Sc. L. R. 811, 11 N. C. C. A. 77; *Porton v. Central (unemployed) Body of London*, (1909), 1 K. B. 173, 2 B. W. C. C. 296, 11 N. C. C. A. 78.

A charitable institution, undertook to provide unemployed persons with board and lodging, and occasionally gave small sums of money to persons working in the yard. A person so engaged was injured and sought compensation. The county court judge found that the institution was not carrying on a "trade or business" within the meaning of the act, and second that there was no "contract of service" between the parties within the meaning of the act. On appeal, the court without deciding the question of carrying on a "trade or business," held that claimant did not succeed in establishing a contract of service.⁴⁰

A person, who sought board and lodging from the salvation army while he was seeking other employment, sustained injuries while performing work which such persons were required to render while remaining at the institution. The court holding that the business respondent was engaged in did not come within the Workmen's Compensation Act, said: "The stipulation filed on June 14, 1915, being the one concerning the facts in the case, does not allege facts even as much as raising a presumption that the business in which the respondent is engaged comes within any of the provisions of the law designating hazardous or extrahazardous employments. The name of the respondent, as given in the title of the case 'Salvation Army Industrial Home' barely suggests that it possibly may be engaged in some extrahazardous business that would bring it under the terms and provisions of the compensation act by operation of law; and inasmuch as there is no showing here that the business in which the respondent is engaged is extrahazardous, or that the respondent has elected to operate under the terms of the workmen's compensation act, this board has no jurisdiction. If there is any liability at all, it is in some other forum than the Industrial Board."⁴¹

Where an employee was injured by a fall down steps in a charitable hospital, and later died from the effects of the fall, it was held that under the statutes of the state and ordinances of the city

40. *Burns v. Manchester & S. Wesleyan Mission*, 1 B. W. C. C. 305, (1908), 11 N. C. C. A. 77.

41. *Dery v. Salvation Army Industrial Home*, Ill. Ind. Bd., (1915) 11 N. C. C. A. 79.

the operation of the hospital came within the term "extrahazardous employments," and therefore the dependants of deceased were entitled to compensation for the death resulting from an accident arising out of the employment.⁴²

Where a charity worker fell and sustained injuries when leaving a doctor's office, where she had gone for information, it was held that the accident arose out of the employment.⁴³

§ 314. **Chauffeur.**—Where a chauffeur, engaged in moving bricks, quarreled with another chauffeur as to who should load first, and was injured in a fight that ensued, which he himself provoked, it was held that in engaging in a fight the employee placed himself within the exception of the act which denies compensation to any employee when by wilful intention he seeks to bring about the injury or death of himself or another.⁴⁴

Where a chauffeur, who was employed to drive a passenger to a station, arrived before train time and proceeded to drive about the town for his own and the passenger's personal pleasure, and was killed by the passenger while so doing, it was held that the death did not arise out of the employment, for in driving about town the employee had ceased to be acting within the course of his employment.⁴⁵

An employee was killed in a collision with an electric car, while driving an automobile of a fellow employee with which he was not familiar. There were no instructions from the employer as to which one of the two employees should drive. The court held that, while the employee might have been guilty of negligence, still he was acting within the course of his employment and his injury arose out of the employment.⁴⁶

42. *Hahnemann Hospital v. Indus. Bd. of Ill.*, 282 Ill. 316, 118 N. E. 767, 1 W. C. L. J. 754.

43. *Gerard v. Associated Charities of San Francisco*, 2 Cal. Ind. Acc. Comm. 705.

44. *Stillwagon v. Callon Bros.*, 183 App. Div. 141, 170 N. Y. Supp. 677, 2 W. C. L. J. 379, 16 N. C. C. A. 932.

45. *Central Garage of LaSalle v. Indus. Comm.*, 286 Ill. 291, (1919), 121 N. E. 587, 3 W. C. L. J. 428, 18 N. C. C. A. 1052; *Hatter v. Payne*, 1 Cal. I. A. C. 647, 12 N. C. C. A. 179.

46. *Maryland Casualty Co. v. Indus. Acc. Comm.*, 39 Cal. App. 229, 178 Pac. 542, 3 W. C. L. J. 577.

Two chauffeurs were cleaning a garage and cars according to directions of their employer. One found a dynamite cap, and in attempting to remove a wire from it, it exploded and injured the other employee. In holding that the injury arose out of the employment the court said: "It was the duty of the employee to acquaint his employer of the finding of the cap. The attempt to remove the wire might have been careless but it was not either a sportive or a wilful act. The claimant suffered injury from a fellow employee's act while claimant was performing his duties. He was injured through the carelessness and neglect of a fellow workman, which was an accidental risk of his employment."⁴⁷

Where a chauffeur got some foreign substance into his eye while driving, which destroyed the sight of his eye, the board found that the loss of the eye was due to an accident arising out of the employment.⁴⁸

Where a demonstrating chauffeur was injured while driving one of the demonstrating machines of his employer, it was held that the injury arose out of the employment.⁴⁹

Where claimant lent his machine to an automobile club for use in an outing for orphan children, and was injured while driving his own car to the orphanage, it was held that he was not injured in the course of his employment.⁵⁰

A chauffeur, employed to drive two passengers, was seen to depart and a couple of days later his dead body was found by the roadside, the circumstances tending to show that he had for some unknown reason, not that of robbery, been murdered by the passengers. It was held that such evidence was insufficient to establish that his murder was due to any risk arising out of the employment. It was also held that there is no presumption in law to the effect

47. *Laurino v. Donovan*, 186 App. Div. 387, 173 N. Y. S. 619, 1919, 17 N. C. C. A. 944; *Rogers v. Rogers* (Ind. App.), 122 N. E. 778, (1919), 18 N. C. C. A. 1039.

48. *Grant v. Narlian*, 1 Cal. I. A. C. 482, (1914), 12 N. C. C. A. 179.

49. *Todd v. Drouet & Page Co.*, 3 N. Y. St. Dep. Rep. 351, 12 N. C. C. A. 178.

50. *In re Derby*, Ohio Ind. Com., (1915), 12 N. C. C. A. 178.

that a chauffeur is, by reason of his employment, subject to any special risk of being murdered.⁵¹

Where a chauffeur was killed while driving at the rate of seventy miles an hour, it was held that his act in so doing amounted to foolhardiness and would be classed as wilful misconduct.⁵²

Where a chauffeur fractured his arm while cranking an automobile, and later abscesses developed, it was held that the extended disability was due to the accidental injury arising out of the employment.⁵³

Where a chauffeur was waiting for his employer's automobile to be repaired in a garage and volunteered to crank the machine and sustained a broken arm in so doing, it was held that he was serving no interest of his employer, and therefore his injury did not arise out of the employment.⁵⁴

Where a truck driver, whose duties required that he take a truck back to the garage after work, allowed another to drive the truck on the way home and, while that other was driving, fell from the truck and was killed, the court held that the employee was not at the time of the injury engaged in the performance of the duties of his employment, and therefore it could not be said that the accident arose out of the employment.⁵⁵

§ 315. **Concussion of Brain.**—An employee fell while at work, and the evidence tended to show that there were no obstacles about over which the employee might have tripped. He was first seen lying on the ground frothing from the mouth. A post mortem examination revealed a hemorrhage of the brain of long standing. The medical testimony was to the effect that decedent came to his death as the result of a blood clot on the brain. The board awarded compensation, holding that death was due to the fall. On appeal

51. *Gibson v. Aves*, 2 Cal. I. A. C. D., (1915), 185, 10 N. C. C. A. 645.

52. *Head v. Fidelity & Deposit Co.*, 1 Cal. I. A. C. D. (1914), 32, 8 N. C. C. A. 904.

53. *Newcomb v. Albertson*, 85 N. J. L. 435, 89 Atl. 928, 4 N. C. C. A. 783.

54. *Delong v. Krebs*, 1 Cal. I. A. C. D. 592.

55. *Morris v. Indus. Comm.*, — Ill. —, (1920), 128 N. E. 727, 7 W. C. L. J. 41.

the decision of the board was reversed, the court holding that such finding could only be based on mere conjecture or guess.⁵⁶

A workman was found unconscious at the foot of a ladder over which he had to climb every few minutes. He was suffering from concussion of the brain. The court held that the evidence was sufficient to justify the conclusion that the concussion of the brain was brought about by an accidental fall from the ladder while the employee was performing his duties.⁵⁷

An employee suffered a concussion of the brain from an accidental injury. He recovered sufficiently to return to work, and later was seen to fall, and he died almost immediately. The medical testimony was to the effect that the first injury was the cause of the death. It was held that the death was due to an injury arising out of the employment.⁵⁸

A traveling salesman, crossing on a ferry from San Francisco to Oakland on business, became dizzy, and after landing fell because of the dizziness, causing concussion of the brain. There was no evidence that the bay was rough or the weather bad at the time of crossing. It was held that there was no evidence to show a causal connection between the cause of the fall and any risk incidental to or arising out of the work to be performed. The claimant did not discharge the burden of proving that the fall was due to an accident arising out of the employment.⁵⁹

§ 316. **Contagious Skin Disease.**—Applicant, a porter in an infectious disease hospital, was employed in the wards and also to clean out the mortuary. He contracted scarlet fever and claimed compensation under the workmen's compensation act. It was held that it was very likely that he contracted the disease in or about the hospital, and the contracting of a disease could not, under the

56. *Hansen v. Turners Const. Co.*, 224 N. Y. 331, 120 N. E. 693, 3 W. C. L. J. 168, 17 N. C. C. A. 786.

57. *Fagan v. Jack Bros.*, 31 Sheriff Ct. R. (Sc.), 332, (1915), 10 N. C. C. A. 620; *Meyers v. Michigan Cent. R. Co.*, 199 Mich. 134, 165 N. W. 703, 15 N. C. C. A. 277.

58. *Deem v. Kalamazoo Paper Co.*, 189 Mich. 655, 155 N. W. 584.

59. *Van Winkle v. Johnson Co.*, 2 Cal. I. A. C. Dec. 212; *Hoover v. Engwick*, 2 Cal. I. A. C. D. 875.

circumstances, be called an accident within the meaning of the act.⁶⁰

Where an employee contracted eczema as a result of being exposed to fumes and splashes of carbon bisulphide, it was held to be an injury by accident arising out of the employment.⁶¹

A bookkeeper in an ice and storage plant contracted impetigo contagiosa, which might have been contracted outside of his employment. He was very susceptible to this disease. There was nothing in or about the employment that would be likely to cause the disease. The employees all used a roller towel and the disease might have been communicated in this manner from a fellow employee who had been affected by the disease. It was held that the evidence was insufficient to show that the disease was due to an injury arising out of the employment.⁶²

§ 317. **Delirium Tremens.**—An employee was injured by a keg rolling off a brewery wagon and striking him on the leg. He was taken to a hospital where he died nine days later from delirium tremens and alcoholic meningitis. It was found that the condition of alcoholism was aggravated by the accidental injury arising out of the employment.⁶³

Where an ice wagon driver claimed to have sustained injuries when ice tongs slipped, causing a cake of ice to strike him in the abdomen, and died later from delirium tremens, the commission found that the predominating cause of the death was the accidental injury during the course of the employment, and that the delirium tremens was only a contributory cause.⁶⁴

Where a printer slipped and fell upon a floor, striking his head, and later developed delirium tremens and died, the board found

60. *Martin v. Manchester Corp.*, (1912), W. C. & Ins. Rep. 289, 5 B. W. C. C. 259, 106 Law T. R. 741, 28 Times Law Rep., 344, 3 N. C. C. A. 238.

61. *Evaus v. Dodd*, 5 B. W. C. C. 305.

62. *Allen v. Los Angeles & Storage Co.*, 3 Cal. I. A. C. 104.

63. *Dunn v. West End. Brg. Co.*, N. Y. S. D. R. Vol. 5, pg. 380; Affirmed by the Appellate Div., (1916); *Sullivan v. Industrial Engineering Co.*, 173 App. Div. 65, 158 N. Y. S. 970.

64. *Carroll v. Knickerbocker Ice Co.*, 169 N. Y. App. Div. 450, 155 N. Y. S. 1; *McCahill v. N. Y. Transportation Co.*, 201 N. Y. 221, 94 N. E. 616. 48 L. R. A. N. S. 131, Ann. Cas. 1912A 961.

that the death was due to the injury arising out of the employment, and the appellate division unanimously and without opinion affirmed the finding.⁶⁵

Where an employee was struck by a falling timber and later developed lobar pneumonia and delirium tremens, the court held that there was a sufficient showing of connection between the accidental injury during the course of employment and the cause of the death to justify an award for, "As a matter of fact delirium frequently follows an injury. A man need not be a hard drinker to become delirious after an injury. Men who are very moderate drinkers become delirious shortly following an injury. We have cases like this day after day. We have had doctors here and they agree that a man who is a moderate drinker may become delirious following not a very severe injury, and where the man dies in delirium and the immediate cause of his death was delirium tremens, and yet the cause of his delirium was the accident, the cause of his death was the accident."⁶⁶

An employee complained of hernia, and the claim agent advised an operation. The operation was performed, but prior to the operation delirium tremens and lobar pneumonia resulted, causing the death of the employee. A claim for compensation was dismissed, because of a failure on the part of the employee to give notice of the strain which he claimed caused the hernia.⁶⁷

Where it appeared that delirium tremens would not have developed had it not been for the injury and shock resulting from an accident arising out of the employment, the court, holding that the death was due to the injury, said: "The fact that his system had been so weakened by his intemperate habit that it was unable to withstand the effects of the injury does not thereby shift the

65. *Winters v. N. Y. Herald Co.*, 171 N. Y. App. Div. 960, 155 N. Y. S. 1149.

66. *Sullivan v. Indus. Engineering Co.*, 173 N. Y. App. Div. 65, 158 N. Y. S. 970; *Rzepeznski v. Manhattan Brass Co.*, 181 N. Y. App. Div. 952; *Beckwith v. Bastian Bros. Co.*, 181 N. Y. App. Div. 909, 167 N. Y. S. 1087.

67. *Herbert v. Lake Shore & M. S. R. Co.*, 200 Mich 566, 166 N. W. 923, 1 W. C. L. J. 1069.

proximate cause of death from his injury to his intemperate habit."⁶⁸

§ 318. **Dislocation.**—An employee of a corporation was injured while delivering books to one of the stockholders, when he slipped and fell down stairs, causing the box to tip and fall, dislocating two joints of his spine. Reversing an award of compensation in favor of claimant, the court said: "It appears conclusively that such temporary service was of a casual nature, a mere accommodation undertaken by the corporation for one of its stockholders without charge, and in no sense a part of its special machine shop business in which both Shelby (the corporation's general manager from whom the order to deliver the books emanated) and plaintiff was employed. 'Uncompensated favors extended occasionally to its stockholders surely do not constitute "business" of a corporation, "usual" or otherwise.' " The court held further that the accident did not arise out of and in the course of applicant's employment.⁶⁹

An employee in a laundry suffered a dislocation of the womb, as the result of a strain caused by carrying a bucket of starch. The medical evidence showed that the straining and heavy lifting was the direct cause of the injury, but that the injury was made possible by a laceration of the womb at the time of child birth thirty years before. Compensation was awarded.⁷⁰

A dislocation of the semilunar cartilage of the knee, caused by quickly arising from a stooping position, is an injury arising out of the employment, when the very nature of the employment requires such exertions.⁷¹

Where an employee slipped and fell, dislocating his clavicle, and was operated upon three days later and died from hypostatic

68. *Ramlow v. Moon Lake Ice Co.*, 192 Mich. 505, 158 N. W. 1027, L. R. A. 1916F, 955; 14 N. C. C. A. 295; *In re Cross*, (Mass.), 1 Nat. Comp. Jour., (1914), 21, 9 N. C. C. A. 261; *Minnis v. Young*, 9 N. Y. St. Dep. 314.

69. *Carnahan v. Mailometer Co.*, 201 Mich. 173, 167 N. W. 9, 1 W. C. L. J. 1045.

70. *Loustalet v. Metropolitan Laundry Co.*, 1 Cal. I. Acc. Comm. D., (1914), 318, 10 N. C. C. A. 771,

71. *Giampolini-Lombardi Co. v. Raggio*, 2 Cal. Ind. A. C. 936.

pneumonia, caused by the weakening of his system by the operation, it was held that the death was due to an injury arising out of the employment.⁷²

Where an employee, through accidental injury, suffered a dislocation of the coecum, general adhesions in the abdomen, and constipation, resulting in traumatic peritonitis, which condition necessitated the removal of the appendix, all this was held to be caused by the accident arising out of the employment.⁷³

Where an elevator operator, in raising heavy gates above his head, sustained a dislocation of the collar bone, it was held that the injury arose out of the employment.⁷⁴

§ 319. **Drivers Injured.**—Where a teamster was kicked by a horse, and applied salve and continued to work without consulting a doctor, though advised to do so, it could not be said that he was guilty of such unreasonable conduct as would preclude a recovery, where the employer merely suggested that he see a named doctor and the employee was not informed that the employer was furnishing the doctor.⁷⁵

“The relator’s husband, Charles Jacobson, was employed by the City of Minneapolis. He was driving a sprinkling wagon. He furnished his team and the running gears of the wagon. The city furnished the tank. He kept the sprinkler in the rear of his house and stabled his horses in his barn on his premises, and fed and cared for them at his own expense. He worked eight hours a day, commencing at 8 and quitting at 5, with an hour off at noon, and received for his services and the use of his team and wagon \$6 per day. On the day of his injury he had finished his day’s work, had gone home and stabled and fed his horses, and had eaten his supper. After supper he went to the stable to doctor one of his horses which had a sore neck. While he was so engaged the horse killed him. The facts stated give no right to compensation. The

72. *Cantwell v. Travelers Ins. Co.*, 2 Mass. W. C. C. 246.

73. *Gregg v. Frankfort Gen. Ins. Co.*, 2 Mass. Wk. Comp. Cases 581.

74. *Bonin v. California Hawaiian Sugar Refinery*, 3 Cal. I. A. C. 334.

75. *Banner Coffee Co. v. Billig*, 170 Wis. 157, (1919), 174 N. W. 544, 5 W. C. L. J. 118.

plaintiff's work for the day was done. He was not to do service for the city until the next morning. The horses were his and he fed and cared for them, and furnished them and his wagon ready for work at a definite time. The accident did not arise out of his employment any more than would an accident which came while he was repairing his wagon or while doing other work in preparation for his next day's work for the city. The relator cites cases where a teamster, injured while caring for his horses after their work for the day was done, was allowed compensation. *Smith v. Price*, 168 App. Div. 421, 153 N. Y. Supp. 221; *Costello v. Taylor*, 217 Ill. 179, 111. N. E. 755; *Duburban Ice Co. v. Industrial Board*, 274 Ill. 630, 113 N. E. 979. They involve situations where a teamster was doing work for his employer in the care of his employer's team and as a part of the work for his employer."⁷⁶

Claimant, a garbage collector, was injured as a result of his horses becoming frightened while he was taking his horses and equipment back to the barn of his immediate employer. Claimant's immediate employer Boadi was not subject to the provisions of the compensation act. In holding that he was entitled to compensation for an injury arising out of and in the course of the employment, the court said: "Boadi was not subject to the provisions of the Compensation Act, and that act provides (Stats. sec. 2394—3) that an employer subject to the provisions of the act shall be liable for compensation to an employee of a contractor or subcontractor under him who is not subject to the act in any case where such employer would have been liable for compensation if such employee had been working directly for such employer. The city of Milwaukee is subject to the provisions of the act, and this provision plainly made the claimant here the employee of the city while carrying out Boadi's contract with the city to the same extent that he was an employee of Boadi so far as the purposes of the Compensation Act are concerned. So there can be no doubt of the existence of the relation of employer and employee within the meaning of the Compensation Act at the time of the accident. That the claimant was then performing services growing out of and incidental to his em-

76. *State ex rel. Jacobson v. District Court of Hennepin County*, 144 Minn. 259, 175 N. W. 110, 5 W. C. L. J. 288.

ployment seems equally beyond doubt. He was taking the garbage collection equipment, part of which belonged to the city, to its usual place of storage and care so that it should be ready for the work of the following day. We can hardly conceive of a service which grows out of and is incidental to his employment as a garbage collection if this is not such a service.⁷⁷

A teamster's duties required him to go among customers to pick up business. He slipped and fell on a runway at the door of a customer, sustaining injuries causing his death. It was contended that the injury did not arise out of and in the course of the employment. The court said: "This contention is without merit. It clearly appears that a part of the business of deceased was to go to customers of his employers and pick up business; that Randall & Co., were such customers and that he was compelled to go through Randall & Co.'s, building to reach Spahus, another of his customers. The wagon and team that he had been using had been left in the alley, and the reasonable inference to be drawn from the facts proven is in complete accord with the testimony of a witness who testified, 'I suppose he went back there to see if he could get a load.' The rule has been announced and frequently applied that if the employee is injured while in the performance of any of his duties such injury arises out of the employment. The evidence in this case fairly tends to show that the injury arose out of the employment."⁷⁸

Where a teamster indulged in horseplay with a fellow employee, who threw a stick at him, striking him in the eye, it was held that as the injury resulted from horseplay or fooling, plaintiff was not entitled to compensation.⁷⁹

77. *City of Milwaukee v. Fera*, 170 Wis. 348, 174 N. W. 926, 5 W. C. L. J. 336.

78. *Heinze v. Indus. Comm.*, (1919), 288 Ill. 342, 123 N. E. 598, 4 W. C. L. J. 361, 18 N. C. C. A. 1020; *E. E. Walsh Teaming Co. v. Indus. Comm.*, (Dec., 1919), 290 Ill. 536, 125 N. E. 331, 5 W. C. L. J. 377.

79. *Pierce v. Boyer-Van Kuran Lbr. & Coal Co.*, 99 Neb. 321 156 N. W. 509, 15 N. C. C. A. 287.

Where a teamster was bitten by a cat, which was usually kept about the stable, it was held that the accident arose out of the employment.⁸⁰

Four years before his death, decedent, a teamster, received a fall in the course of his employment, which resulted in impairment of his memory. One afternoon he was ordered to return to the stable with his horse and was found in a swamp. He died later from pneumonia. It was contended that the death was due to the previous fall and therefore was due to an accident arising out of the employment. In reversing an award, the court said: "If the horse driven by Milliken had run away and Milliken had been thereby thrown out and killed the personal injury in fact suffered in that case would have been one which from the nature of his employment would be likely to arise and so would be one 'arising out of his employment.' But as we have said, there is nothing in the employment of driving a wagon which makes it likely that the employee will alight from his wagon, wander to and fall into a swamp, and lie there all night. It seems plain that if Milliken's death was caused by a personal injury, it was the one which happened some four or five years before the occurrence here complained of and before the Workmen's Compensation Act was passed. At that time he fell from his wagon and striking on his head suffered as a result an impairment of his memory."⁸¹

Where a driver was kicked, when he was leading his employer's horse past other horses in a blacksmith shop, for the purpose of having shoes put on the horse, it was held that the accident arose out of the employment.⁸²

Where a teamster was killed while watering extra teams belonging to his employer, it was held that the accident arose out of the employment.⁸³

80. *Rowland v. Wright*, 77 L. J. K. B. 1071, 99 L. T. R. 758, 24 T. L. R. 852, 3 N. C. C. A. 278, 1 B. W. C. C. 192 (1908).

81. *Milliken v. A. Towle & Co.*, 216 Mass. 293, 103 N. E. 898, 4 N. C. C. A. 512.

82. *Kenefick v. Laurer Brewing Co.*, 4 N. Y. St. Dep. Rep. 350.

83. *Suburban Ice Co. v. Indus. Bd.*, 274 Ill. 630, 113 N. E. 979; *Gylfe v. Suburban Ice Co.*, 1 Bull. Ill. Ind. Bd. 167, 11 N. C. C. A. 325; *In re Puterbaugh*, 1 Bull. Ohio. Ind. Com. 143.

Where a teamster lost his eyesight as the result of infection from disinfecting a stable, it was held that he had suffered an injury that arose out of the employment.⁸⁴

A teamster left his team, while waiting for his wagon to be loaded, and crawled on top of a car. The team became frightened and ran away. In an attempt to stop them the driver was injured so that he died. It was held that the accident did not arise out of the employment.⁸⁵

It has been held that an injury sustained by a driver in attempting to stop a runaway horse, when such runaway is not due to the negligence of the driver, is an accidental injury arising out of the employment.⁸⁶

Where a driver was injured while driving his wagon back to the place of his employment, after making a delivery for his employer, it was held that he was injured by an accident arising out of and in the course of his employment.⁸⁷

Where a teamster for a brewery was overcome by heat while returning to the brewery after making a delivery, it was held that the employment of deceased exposed him to no extra hazard from the danger of becoming overheated, and that while the accident arose in the course of the employment, it did not arise out of it.⁸⁸

Where a teamster was injured when a shot gun, which was taken along by a fellow employee for his own pleasure, was accidentally discharged, the court, in holding that the accident did not arise out of the employment, said: "The case is clearly one where an employee in the performance of his duty meets with an accident bearing no relation whatsoever to the nature of the employment. The only argument in support of the award would be, it seems to us, that the employer in permitting the fellow em-

84. *Walker v. M. Mosson Co.*, 3 N. Y. S. Dep. 362.

85. *Oliver v. Smith*, 38 N. J. L. J. 148.

86. *Kossoff v. R. H. Macy & Co.*, (1916), 7 N. Y. St. Dep. 430; *Dale v. Hual Const. Co.*, (1916), 9 N. Y. St. Dep. 282.

87. *White v. East St. Louis Ry. Co.*, 211 Ill. App. 14, 17 N. C. C. A. 938; *Smith v. Price*, 153 N. Y. S. 221, 9 N. C. C. A. 712, 168 App. Div. 421.

88. *Campbell v. Clausen-Flanagan Brewery*, 183 N. Y. App. Div. 490, 171 N. Y. S. 522, 2 W. C. L. J. 676, 17 N. C. C. A. 1002.

ployee to take with him the shotgun subjected the injured man to an extra hazard. But as against this it is clear that the employer, though he knew that the shotgun was to be taken along, neither ordered it nor in any other way than by his silence assented to it. It is not even contended that the employer knew that the gun was loaded, and unloaded it was as harmless as any of the tools which they were carrying. It was quite open to the injured man to object to the presence of the gun, if in fact he did object to it, and it was but a part of common prudence for him to have seen that the gun was unloaded when he assented to his nephew placing it in this obviously dangerous position. * * * This accident was no more reasonably incident to the employment than it would have been had a pistol been carried in the nephew's pocket and by the same jolt of the wagon had been accidentally discharged to the injury of the uncle."⁸⁹

A driver was crushed under a load of lumber and suffered several broken ribs. He died later, and it was contended that the death was due to disease, and not to the accident arising out of the employment. In holding that the death was due to an accident arising out of the employment, the court said: "An autopsy disclosed that he (deceased) had pulmonary tuberculosis in such an advanced stage that one lung had been entirely destroyed and the other to a considerable extent; also that he was suffering from other diseases. The relators called three physicians who testified that, in their opinion, his death was caused by pulmonary tuberculosis, and that the injuries which he had sustained were not sufficient either to cause or hasten his death. The claimant called no physicians, but other witnesses testified that the deceased had worked continuously at hard labor until the accident, had apparently been in good health at all times theretofore, and had never been able to leave his bed thereafter. In view of all the circumstances, we are unable to say that it conclusively appears that the injuries sustained had no part in causing his death, nor

89. *Ward v. Indus. Acc. Comm. of the State of Cal.* 175 Cal. 42, 164 Pac. 1123, 15 N. C. C. A. 223.

that the trial court was concluded by the testimony of the experts.⁹⁰

A teamster was found bruised and crushed between the wheels of his wagon in a washout, as it appeared, when he was on his way to return the team to the barn. There was evidence that deceased was a sober, healthy man, although on account of the cold he and another driver had taken whiskey while on the way home. The board found that his death was due to injuries sustained when his wagon struck the washout, throwing him beneath the wheels of the wagon, and that the injury or accident causing the death arose out of the employment.⁹¹

A teamster left his wagon to collect receipts which had been scattered by the wind, and was struck by a passing automobile and fatally injured. The court, in holding that the injury arose out of and in the course of his employment, said: "In the case at bar the employment of Kearney to drive a team through the public streets and deliver goods required of him every reasonable and lawful effort to accomplish his task. His work did not require him to stay on his wagon. He was bound in the performance of his duty to use the street to deliver goods, to regain packages or papers fallen from the wagon, as also to care for his horses, adjust the harness and repair the wagon, if necessary. It is manifest he might be injured while in the street in the performance of duty, and it is plain his employment therein exposed him to the particular injury he received."⁹²

Where a teamster, upon discovering that no chute with which to unload coal had been placed upon his wagon, went to a nearby saloon to telephone for one, in accordance with his instructions covering such cases, and was struck by a passing automobile and seriously injured, the court held that the evidence justified the board in finding that at the time of deceased's death he

90. *State ex rel. Jefferson v. District Court of Ramsey Co.*, 138 Minn. 334, 164 N. W. 1012, 15 N. C. C. A. 645.

91. *Leary v. Mellvain*, (1919), 106 Atl. 785, 263 Pa. 499, 4 W. C. L. J. 453; *Brisco v. Englert*, 4 N. Y. St. Dep. 345.

92. *Kearney's Case*, (1919), 232 Mass. 532, 122 N. E. 739, 4 W. C. L. J. 103, 18 N. C. C. A. 1039.

was doing the very thing that he was supposed to do, and that his injury was due to an accident arising out of and in the course of the employment.⁹³

A driver of a delivery wagon for a florist, who was supposed to assist in delivering when his services were needed for this purpose, was injured when he fell from a ladder, while adjusting a window box in a house where he had delivered flowers. The court held that in rendering these services to a customer, decedent had departed from his employment and therefore the injury did not arise out of the employment.⁹⁴

Where a driver of a truck and deceased, employees of a teamster, sent to haul goods to a station after loading boxes which were on a platform, used an elevator to move goods from a top floor, they did not depart from the scope of their employment; and riding on the elevator with the boxes did not amount to a deliberate and reckless indifference to danger which would bar a recovery.⁹⁵

§ 320. **Drowning.**—A repair man about furnaces was found drowned in a river bordering on the premises of the plant. It appeared from the evidence that at times the heat from the furnaces became intense, and that gas was likely to and did escape, and when inhaled by the workmen that they went outside for air, and that the usual place to go was to the river bank. The evidence further showed that on the night in question there was no gas about the furnace and no repairs were made. In the absence of any direct evidence as to the manner in which deceased met his death, it was contended that the reasonable inference to be drawn was that he had gone to the river in the performance of his duties, accidentally fell in and was drowned. The court held that the burden of proving that the accident arose out of the employment, while deceased was performing his duties, rested upon applicant, and he failed to discharge this burden. A showing of

93. *Consumer's Co. v. Ceislik*, (1919), — Ind. App. —, 121 N. E. 832, 3 W. C. L. J. 620, 18 N. C. C. A. 1040.

94. *Glatzl v. Stumpp*, 220 N. Y. 71, 114 N. E. 1053.

95. *Colbourn v. Nichols*, 109 Atl. 882, —Del. Sup. Ct. —, (1920), 6 W. C. L. J. 140.

facts which are equally compatible with two views will not sustain applicant's claim, but would simply amount to the basing of an award upon imagination, speculation, or conjecture.⁹⁶

A cook, who was employed aboard a tugboat, went ashore to purchase provisions, which was part of his duties, and upon returning with a portion of the provisions, fell overboard from a wharf, to which his boat was moored, and was drowned. The court held that at the time of the accident deceased was performing a part of his duties. The risk was one occasioned by the nature of his employment. The injury was traceable to the nature of his work and to the risks which his employer's work exposed him. Therefore the accident arose out of the employment.⁹⁷

A captain of a tugboat was discharged for intoxication, and paid off about 11:30 a. m. He stayed around the boat for some time, and finally, after dinner at about 1:30 p. m., he started for the shore and was never seen alive again. His body was found in the river in the vicinity of the pier several months later. The court on appeal said: "If it be considered that, after the discharge of the deceased, his employment continued a reasonable length of time, to enable him to remove his belongings from the boat, it must nevertheless have ceased immediately upon his leaving it. It cannot be inferred that he fell into the water while in the act of leaving the boat, or prior thereto, rather than after leaving it he fell from the dock, while proceeding along its edge in an intoxicated condition. Indeed, it would seem that, if he fell while in the act of leaving, the engineer who saw him start for shore would have heard a splash of water when he struck it, or heard him cry for help. Only a mere guess leads to the conclusion that the deceased fell into the water prior to attaining a secure foothold upon the pier. There was no proof, therefore,

96. *Wisconsin Steel Co. v. Indus. Commission*, 288 Ill. 206, (1919), 123 N. E. 295, 4 W. C. L. J. 168.

97. *Westman's Case*, 118 Maine 133, (1919), 106 Atl. 532, 4 W. C. L. J. 213; *State ex rel. McCarthy Bros. Co. v. District Court of Hennepin Co.*, 141 Minn. 61, 169 N. W. 274, 17 N. C. C. A. 959; *Proctor v. Serbins (Owners of)*, (1915), 3 K. B. 344, (1915), W. C. & Ins. Rep. 425, 10 N. C. C. A. 618; *In re Martin H. Ash.*, 2nd A. R. U. S. C. C. 241.

that the deceased came to his death through an accident arising in the course of his employment."⁹⁸

A nightwatchman left his usual place of employment and went to visit the owner of a boat, which was lying along side the place of his employment. Upon returning he attempted to jump from the boat back to the dock, and fell into the water, dying from the exposure. The court held that, in abandoning his duties, deceased left the scope of his employment, and his injury was not a natural incident of his work. It was neither a risk connected with his employment, nor a risk arising out of his employment. The accident resulted from the act of the claimant's intestate, disconnected wholly from the sphere of his employment.⁹⁹

An employee of an amusement park, whose duties included operating a boat carrying passengers for hire, was drowned. It appeared that after discharging his load of passengers he proceeded to another landing, having in the boat a young woman who was not a passenger for hire. When he stepped from the boat, the boat slipped away. He attempted to get back into the boat by leaping, but fell in the water. He caught hold of the bow of the boat. The young lady offered to assist him but he declined her assistance, dropped from the boat, and began to swim on his back to the stern of the boat. When about 20 feet from the stern of the boat he sank and was drowned. Earlier in the day he had boasted of his abilities as a swimmer. In affirming a judgment for compensation, the court said: "It is insisted that the evidence does not justify the finding and ruling of the commission that, after Boyler had fallen into the water and began to swim upon his back toward the stern of the boat, such act was not a departure from the course of his employment. An examination of the evidence shows that it was just as reasonable to infer that Boyler was attempting to get into the boat as that he was making

98. *In re Whalen*, 173 N. Y. Supp. 856, (1919), 18 N. C. C. A. 1037, 3 W. C. L. J. 510, 186 App. Div. 190.

99. *King v. Standard Oil Co. of New York*, 184 N. Y. App. Div. 453, 171 N. Y. S. 1032, 17 N. C. C. A. 938.

an exhibition of his skill as a swimmer, of which he had just previously been boasting."¹

Where an employee on a boat, while in an intoxicated condition, attempted to go ashore in a small boat in search of more whiskey, and was drowned, it was held that the accident was due to the employee's intoxication, the court saying: "If Collins was in an intoxicated condition, that is, a condition in which he would be unable to look out for his own safety with that degree of care which a person would otherwise naturally exercise, and that, while so influenced, he did something which a person in a normal condition would not be likely to attempt and which brought about the accident, the trial court would be warranted in finding that the accident resulted from the condition into which he had voluntarily brought himself. We do not think that the statute requires that every possibility should be excluded before the evidence becomes sufficient to support the finding that the result was due to intoxication. We think that the intoxicated condition of the decedent is fully substantiated by the evidence, and that his reckless and unnecessary act in going into and standing up in a small boat, easily capsizable, was a dangerous act which would be apparent to any sober person. The very fact that he elected to make use of this small boat, instead of the larger yawl, which was lying close to it and was equally available, is further evidence of his condition and of his inability therefrom to properly care for himself."²

An assistant engineer on a dredge was drowned while attempting to save the dredge from destruction during a storm. The trial court found that the sinking of the dredge was due to the violence of the storm, and that the death of the engineer was due to an accident arising out of the employment. In affirming the decision, the court said: "The nature of the employment, the conditions under which it was to be and was pursued, the exposure to prob-

1. *Boyle v. Mahoney & Tierney*, 92 Conn. 404, 103 Atl. 127, 16 N. C. C. A. 893, 1 W. C. L. J. 938.

2. *Collins v. Cole*, 40 R. I. 66, 99 Atl. 830, 14 N. C. C. A. 290; *In re Pope*, 177 N. Y. App. Div. 69, 163 N. Y. S. 655, 14 N. C. C. A. 293; *McIntyre v. Stewart*, (1915), Sc. L. T. 288, (1915), W. C. & Ins. Rep. 550, 14 N. C. C. A. 294.

able injury from reasonably to be expected storms of similar character were all matters incident to such a risk as was here underwritten, and therefore an injury maturing such a risk, we think, could well be said to have been incidental to and to have arisen out of that employment.'''³

Where a cook on a steamship gave orders to his helper to put certain articles on the stove to cook, and then left the galleys and disappeared, it was held that there was no evidence whatever to justify a finding that deceased met with an accident arising out of the employment.⁴

A floatman, whose duties were to check up and secure cars being transported upon a float, was, upon arrival of his float at its slip, ordered by his superior to take his belongings and go upon another float and await the arrival of a tug. A few minutes later his lantern and gears were found upon the float, and his body was found a few days later floating in the slip. It was held that there was sufficient evidence to justify an inference that deceased met his death as the result of an accident, which arose out of the employment. The case was, however, sent back on questions of dependency.⁵

An employee was drowned as a result of ice breaking upon a pond over which he was crossing. There was a more circuitous route around the pond leading to deceased's home. The pond was on the premises and under the control of the employer. In affirming a finding that the accident arose out of and in the course of the employment, the court said: "While the employee's work for the day had been finished and he was on his way home at the time of the fatal accident, still it is settled that an injury to a workman may arise out of and in the course of his employment

3. *Southern Surety Co. v. Stubbs*, (Tex. App. Div.), 199 S. W. 343, 15 N. C. C. A. 276; *Milwaukee Western Fuel Co. v. Indus. Comm.*, 153 Wis. 635, 150 N. W. 998, 12 N. C. C. A. 76; *Cino v. Morton & Gorman, Contracting Co.*, 5 N. Y. St. Dep. Rep. 387, 12 N. C. C. A. 79.

4. *Lynch v. Crown Steamship Co., Ltd.* 32 Sheriff Ct. Rep. 135, 12 N. C. C. A. 68; *Burwash v. Frederick Leyland & Co. Ltd.*, (1912), W. C. & Ins. Rep. 400, 107 L. T. 735, 5 B. W. C. C. 663.

5. *Tirre v. Bush Terminal Co.*, 172 N. Y. App. Div. 386, 158 N. Y. Supp. 883, 12 N. C. C. A. 64.

even if he is not actually working at the time of the injury." The court said that the finding that the pond was in the control of the employer and that the crossing over it on the ice was "the reasonable and customary way" for deceased to reach his home, and that he and other employees who lived in the same direction "crossed it this way regularly," warranted the further finding that the injury occurred in the course of the employment.⁶

A workman, who was employed in building a bridge over a river, was last seen alive at his home, some miles from where he was employed, which was about two hours before he was to return to work. His body was afterwards found in the bay, but there was no evidence as to how he came to his death. It was held that, in the absence of evidence, it might be inferred that deceased came to his death by accident, but it could not be inferred that the accident arose out of the employment.⁷

A workman, whose duty it was to remove rubbish from a flume, which supplied water for his employer's mill, was seen standing on an unrailed walk, using a rake, with his back towards the river. A few days later his body was found in the water, together with a rake handle. It was held that the evidence justified a finding that he was killed by an accident arising out of and in the course of the employment.⁸

Where a servant was drowned in an attempt to save the life of a fellow servant, it was held that his death was due to an accident arising out of the employment.⁹

A deck hand, who helped load and unload a barge at its terminii, was drowned while riding between such terminii. It was held that the death was due to an accident arising out of the employment, even though he had no active duties to perform while enroute.¹⁰

6. In re Stacy, 225 Mass. 174, 114 N. E. 206, 15 N. C. C. A. 244.

7. Henry Steers Inc. v. Dunnewald, 85 N. J. L. 449, 89 Atl. 1007, 4 N. C. C. A. 676.

8. Boody v. K. & C. C. Mfg. Co., 77 N. H. 208, 90 Atl. 859, 5 N. C. C. A. 840, L. R. A. 1916A, 10.

9. Mathews v. Bedworth, 1 W. C. C. 124.

10. Rideout Co. v. Pillsbury, 173 Cal. 132, 159 Pac. 435, 12 N. C. C. A. 1032.

A traveling salesman was drowned when the steamship Lusitania was sunk by a German submarine. The salesman was enroute to London on his master's business and with his master's knowledge. It was held that the accident arose out of the employment, irrespective of the lawfulness of the attack.¹¹

§ 321. **Electrical Shock and Electrocution.**—An employee was electrocuted when he took hold of an electric wire for the purpose of attaching it to a bucket, with which to draw gasoline from a tank. There was a government order against the using of gasoline for promiscuous purposes, but this order seems to have been disobeyed to the knowledge of the employer. The board made an award for deceased's death. In affirming the award, the court said that, "an employee, who, in an honest attempt to discharge a duty assigned him, does an act incidental thereto not specifically directed, or departs from the usual methods of performing his work, does not thereby necessarily deprive himself or his dependents, of a right to compensation, if injured while so engaged;" that, "an employee may be said to receive an injury by accident arising in the course of his employment within the meaning of the Workmen's Compensation Act of this state when it occurs within the period of the employment, at a place where the employee may reasonably be, and while he is doing something reasonably connected with the discharge of the duties of his employment."¹²

Where a warehouse employee, who went into a wash room to clean up after the day's work, was killed by an electric wire carrying 114 volts of current while he was in the act of washing in a basin provided by the master, the wire having been used in the master's business, it was held that he suffered an accident arising out of and in the course of his employment. The mere fact that the wire may have been placed on the wash basin in a spirit of horseplay, would not defeat a recovery of compensation if the deceased himself was not engaged in the horseplay, and the fact that the current which was only 114 volts, would not ordinarily

11. *Foley v. Home Rubber Co.*, 89 N. J. L. 474, 99 Atl. 624.
Note: For additional cases on drowning, see section 270.

12. *Nordyke & Marman Co. v. Swift*, (Ind. App.), 123 N. E. 449, (1919), 18 N. C. C. A. 1021.

kill a strong man is immaterial, if it is shown by the evidence that it produced fatal results in the present case.¹³

Where a carpenter, engaged in work upon one of defendant's cars, came in contact with an electric wire carrying 550 volts of current and was electrocuted, it was held, in the absence of any direct evidence as to the circumstance surrounding the accident, that the death was caused by an accident arising out of the employment.¹⁴

A lineman, in the employ of the Mississippi River Power Company, who was not an expert in this particular business but was a helper of one of the experts, came in contact with that portion of the electric field from which the current had not been excluded and was killed. The court, in holding that the accident arose out of the employment, said: "Hayward was employed in repairing the tower, and the prohibition against going near the live wire referred to his conduct in doing that work. There is no evidence that he had undertaken to do anything outside of his employment. While no one testified to the particular act he was doing at the time he was struck, if he was doing anything, it is evident that he was on the tower for the purpose of doing his work in the course of his employment, and his contributory negligence in carelessly failing to observe the direction not to go near the live wire does not relieve his employer from liability to make compensation. The theory of the defendant in error is that Hayward deliberately disobeyed orders and walked across the rack into the field of the live wires. The conclusion may fairly be drawn from the evidence that through his inexperience or carelessness he moved too close to the live wires, and in such case the determination of the commission concludes the court."¹⁵

13. *Hollenbach Co. v. Hollenbach*, 181 Ky. 262, 204 S. W. 152, 2 W. C. L. J. 492, 16 N. C. C. A. 879; *Newport Hydro. Carbon Co. v. Indus. Com. of Wis.*, 167 Wis. 630, 167 N. W. 749, 2 W. C. L. J. 421, 16 N. C. C. A. 924.

14. *Bloomington D. & C. R. Co. v. Indus. Bd. of Ill.*, 276 Ill. 454, 114 N. E. 939, 14 N. C. C. A. 140.

15. *Mississippi River Power Co. v. Indus. Comm.*, 289 Ill. 353, (1919), 124 N. E. 552, 5 W. C. L. J. 50.

Where a carpenter in a shop was killed by an electric current when he attempted to turn on the current by means of a switch, for the purpose of putting in motion a grindstone, on which he was going to sharpen a chisel, it was held that in so doing he was acting within the scope of his employment and that his death was due to an accident arising out of the employment¹⁶

An experienced lineman refused to use gloves furnished by the employer. This was in violation of positive rules against handling hot wires without rubber gloves, and was also in violation of an express order from the foreman at the time. The employee came in contact with the wire and received a shock causing his death. It was held that the decedent was guilty of such wilful misconduct as to place him without the scope of his employment, and was not injured by an accident arising out of the employment.¹⁷

A janitor in defendant's office building was furnished by the defendant with living quarters. His wife was managing a restaurant for defendant. Upon request of his wife, he started to carry a basket of laundry to the restaurant, and was killed by a live wire falling on him. It was held that the duties of deceased did not include carrying of laundry or assisting his wife in the care of the restaurant, and therefore the accident did not arise out of and in the course of the employment.¹⁸

§ 322. **Emergency.**—Where an employee in a shirt cutting factory volunteered to save his employer and others from injury during a raid by strikers and, in so doing was fatally injured, it was held that the injury arose out of and in the course of his employment, the court saying: "While there must be some

16. *Wendt v. Indus. Ins. Comm. of Washington*, 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790; *Houghton v. W. G. Root Const. Co.*, 35 N. J. L. J. 332.

17. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 466.

18. *Murphy v. Ludlum Steel Co.*, 182 App. Div. 139, 169 N. Y. S. 781, 1 W. C. L. J. 1122.

Note: For further cases of electric shock and death from electrocution see "Acts Not Constituting Wilful Misconduct." § 283, note 15 and 19 see also "Acts Constituting Wilful Misconduct," § 284, note 40. See *Sportive Acts* § 285, note 54 and 59.

causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected. It must, however, be one which, after the event, may be seen to have had its origin in the nature of the employment. Such was our holding in *Pekin Cooperage Co. v. Industrial Com.*, 285 Ill. 31, 120 N. E. 530. Where a workman voluntarily performs an act during an emergency, which he has reason to believe is in the interest of his employer, and is injured thereby, he is not acting beyond the scope of his employment. An assault arises out of one's employment in a case where the duties of the employee, under the particular situation, are such as are likely to cause him to have to deal with persons who, under the circumstances, are liable to attack him. *Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. 149. Such was the situation in this case. Deceased was assaulted, not for anything he had done, but because he was in the employ of the plaintiff in error, who was in bad favor with the union on account of not having complied with its demands. We are therefore of the opinion that the injury, which occurred in the course of the employment, arose out of the employment.¹⁹

An employee was injured when he attempted to save a child from being run down on the company's premises by an automobile, driven by the president of the company, who was there on the company's business. It was held that the injury arose out of the employment, the court saying: "Nelson was injured in the course of his employment. To be sure, he was not employed to rescue children. But certainly it was reasonably within the course of his employment, within the scope of those things which might reasonably be expected of him as an employee, that he should attempt to prevent an accident on his employer's premises, particularly where the employer would not improbably be responsible for the accident. It is not difficult to imagine how summarily the services of an employee would be dispensed with, who, seeing that such an accident was about to happen, held back and did nothing to prevent it on the excuse that it did not come

19. *Baum v. Indus. Comm.*, (1919), 288 Ill. 516, 123 N. E. 625. 4 W. C. L. J. 357.

within the scope of his employment. If, in this case, Nelson, instead of being injured in an attempt to prevent a child being run over on his employer's premises by an officer of his employer there on his company's business, had been injured in an attempt to put out an incipient fire accidentally started in the barn, it is hardly possible that any question would have been made. Yet there is no real distinction between the two cases. Nelson was no more employed to put out fires than he was to rescue children. The point is that the danger which threatened, and, in attempting to remove which, he was hurt, was one which threatened his employment and directly concerned it, and with which Nelson was confronted in the discharge of his customary duties."²⁰

An employee of a mining company was assisting other employees to replace a derailed car, and was led to believe by the yells of a fellow employee that the car was about to tip over upon him. He jumped to avoid injury, and in so doing fell, striking an open slag spout, thereby seriously injuring his leg. The court held that the injury was occasioned by a condition or conditions of the employment and therefore arose out of the employment.²¹

An employee responded to a call for assistance by a fellow employee, who had been overcome by gas fumes in a vinegar vat. While endeavoring to rescue his fellow employee he was overcome by the fumes and died. There were express instructions against any one entering the vat. In affirming an award, and in holding that the accident arose out of the employment, the court said: "The employer has a pecuniary interest in the lives of his employees. He necessarily relies upon their labor for the conduct of his business out of which he expects to reap a profit, and the attempt of Russel Engledove (deceased) to rescue Thomas Nelson, the servant of the vinegar company, and his

20. *Ocean Accident & Guar. Corp. Ltd. v. Indus. Acc. Comm.*, (1919), 180 Cal. 389, 182 Pac. 35, 18 N. C. C. A. 1018; *Waters v. Taylor*, 218 N. Y. 248, 112 N. E. 727, L. R. A. 1917A, 347; *United States etc. Co. v. Indus. Acc. Comm.*, 174 Cal. 616, 163 Pac. 1013.

21. *Calumet & A. Mining Co. v. Chambers*, 20 Ariz. 54, 176 Pac. 839, 18 N. C. C. A. 1043; *Geary v. Metropolitan St. Ry. Co.*, 84 App. Div. 514, 17 Am. Neg. Rep. 271, 82 N. Y. S. 1016, 16 N. C. C. A. 562.

fellow employee, must be regarded as having been made in the interest and for the benefit of such common employer."²²

An employee went to the assistance of a fellow employee, who was working within a few feet of him but for another employer, when he was caught in a cavein. A second cavein occurred, seriously injuring the employee who went to the rescue, and he died from the effects of his injuries. In affirming a judgment, which held that the accident arose out of and in the course of the employment the court said: "There is no question that Waters' attempt to rescue his fellow workman immediately led to his own injuries, and therefore the only debatable phase of the inquiry must be whether his general employment included and required or authorized the attempt to rescue from sudden peril which threatened his life a fellow laborer working only a few feet away on the same general undertaking, although for a different employer. It seems to us that this act should be regarded as an incident to and within the fair scope of his employment as the latter should be measured for the purposes of the workmen's compensation act. * * * It occurred while he was at work on the undertaking for which he had been hired, and therefore during the course of his employment. It was his employment which brought him where he was, and in a general sense caused him to be confronted with the condition and emergency which he sought to meet. His act was prompted by the relationship existing between himself and a fellow workman, caused by their employment on a common undertaking. It must have been within the reasonable anticipation of his employer that his employees would do just as Waters did if the occasion arose, for it is quite inconceivable that any employer should expect or direct his employees to stand still while the life of a fellow workman, working a few feet away, was imperiled by such an accident as occurred here,

22. *Gen. Accident Fire and Life Assur. Corp. v. Evans*, (Tex. Civ. App.), 201 S. W. 705, 16 N. C. C. A. 920, 1 W. C. L. J. 1148; *United States Fidelity & Guaranty Co. v. Indus. Acc. Comm. of Cal.*, 174 Cal. 616, 163 Pac. 1013, 15 N. C. C. A. 271.

and it seems to us that the accident arose out of his employment.²³

An employee was engaged by a lion tamer for the purpose of taking care of baggage, cleaning out the cages, and to make himself generally useful, but in no event to feed the lions. While in charge of the cages, in the absence of the lion tamer, a lion escaped. In an effort to get the lion back into his cage he threw a chair at him which caused the lion to turn upon and kill the employee. There was no evidence as to how the lion escaped from the cage. On appeal it was held that having been left in charge of the lions it was part of his duty to endeavor to get the lion back into his cage, and that the injury arose out of and in the course of his employment.²⁴

Where an employee was injured in an attempt to save one from injury who was not engaged in the employment, but was merely bothering the employees, it was held that the injury received did not arise out of the employment, no matter how commendable the act might have been.²⁵

An accident to a workman while attempting to stop his master's runaway horse, although his work was in no way connected with horses, was held to be an accident arising out of the employment.²⁶

An employee, who was engaged in different kinds of work about his employer's plant, slipped and fell into an opening, which had been made in the floor, and from which vapor and steam was escaping, making it impossible to see the opening. He fell into hot water, and screamed for help. A fellow employee ran to his assistance, and failed to see the hole for the same reason, and fell into the hot water, sustaining injuries from which he died. The court held that, it being the duty of an employer to save the lives

23. *Waters v. Wm. J. Raylor Co.*, 218 N. Y. 248, L. R. A. 1917A, 347, 112 N. E. 727, 15 N. C. C. A. 270, Affg. 170 N. Y. App. Div. 942, 154 N. Y. S. 1149; *Mihiaica v. Mlagenovich & Gillespie*, 1 Cal. I. A. C. D., (1914), 174, 10 N. C. C. A. 477.

24. *Hapelman v. Poole*, 25 T. L. R. 155, 2 B. W. C. C. 48, 10 N. C. C. A. 489.

25. *Mullen v. D. Y. Stewart & Co. Ltd.*, (1908), Ct. of Sess. Cas. 991, 45 Sc. L. R. 729, 1 B. W. C. C. 204, 10 N. C. C. A. 490.

26. *Kees v. Thomas*, (1899), 1 Q. B. 1015, 58 L. J. K. B. 539, 80 Law Times 578, 15 Times Law 301, 1 W. C. C. 9; *Harrison v. Whitaker Bros.*, 2 W. C. C. 12, 16 Times Law Rep. 108.

of his employees, if possible, when they are in danger, it devolves upon an employee, in his employ, when occasion requires, to do all he can to save a fellow employee, when all are engaged in their employment. The failure of an attempt to rescue a fellow employee will in no way affect the legal relation, and where injury results from such an attempt, the same occurs from an accident arising out of and in the course of the employment, within the meaning of the statute.²⁷

A street car company employee, in the performance of his duty, was trying to prevent a passenger from alighting from a moving car, when he fell or was pushed into the street, sustaining a fracture of the skull which caused his death. It was held that his death was due to an accident arising out of and in the course of his employment.²⁸

The duties of an employee engaged in unloading a vessel necessitated his presence on the quay, and not on the vessel. A fellow employee was overcome by gas in a hold of the vessel. Deceased volunteered to go down to the rescue and was lowered on the crane, but he was also overcome, and before help could be given they both died. The court, holding that the accident arose out of and in the course of the employment, said: "I cannot doubt that, in a sudden emergency where there is danger, a workman does not go out of his employment if he endeavors to prevent the danger from taking effect. For example, if, in a yard where a man is working, a horse suddenly runs off, and there is danger to others, I would hold that, if the man did his best to stop the horse, and met with an injury, he suffered that injury in the course of his employment. It would be a right thing to do, in the interest of the safety of those in the yard, and, therefore, in the interest of his master. The same would apply to the endeavor to sprag a runaway wagon, which might cause loss of life."²⁹

27. *Dragovich v. The Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475; *Hully v. Moosbrugger*, 87 N. J. L. 103, 93 Atl. 79, 3 N. C. C. A. 283. For digest of this case see "Sportive Act."

28. *Miller v. Public Service Ry. Co.*, 35 N. J. L. J. 115, 10 N. C. C. A. 479.

29. *London & E. Shipping Co. v. Brown*, 7 F. 488, 42 Sc. L. R. 357, 10 N. C. C. A. 483; *Aitken v. Finalyson, Bousfield & Co., Ltd.*, (1914), W. C.

A load of coal became mired, and the team hitched thereto was unable to move it. The driver requested plaintiff, a passerby, to assist in removing it, and while so doing he was injured. It was held that the driver had implied authority to employ someone for this temporary purpose, and that the plaintiff became the employee of the coal company for the purpose of rendering this assistance, and was entitled to the protection of the Workmen's Compensation Act.³⁰

Where a millwright, on leaving the plant long after customary working hours discovered a fire in the plant and returned to the building to put it out, and lost his life in the fire. The court, in holding that the death resulted from an accident arising out of and in the course of the employment, said: "He must have entered the building voluntarily, and knowing the possibility of danger in so doing from its being then on fire. But it is a reasonable inference that he did so for either one or both of these purposes: (1) Under the specific duty devolving upon him to have charge of and look after the valuable patterns essential for the work being done by his employer; (2) from the sense of obligation to use a reasonable amount of care to save his employer's property at a time of such emergency. As to each of these it needed no specific instructions from any superior to perform such services or voluntarily assume such responsibility while making an effort within the field of reasonable care to save the property of his employer. While so doing he cannot be considered, as a matter of law, to be a stranger. *McPhee's Case*, 222 Mass. 1, 4, 109 N. E. 633, 10 N. C. C. A. 257; *Munn v. Ind. Brd.*, 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652. We do not think that either the letter or the spirit of the Workmen's Compensation Act requires that such employee should be penalized for obeying such a natural and commendable instinct on his part."³¹

& Ins. Rep. 398, (1914), 2 Sc. L. T. 27, 51 Sc. L. R. 653, 7 B. W. C. C. 918, 10 N. C. C. A. 483.

30. *State ex rel. Nienaber v. Dist. Court of Ramsey Co.*, 138 Minn. 416, 165 N. W. 268, 1 W. C. L. J. 642.

31. *Belle City Malleable Iron Co. v. Rowland*, 170 Wis. 293, (1919), 174 N. W. 899, 5 W. C. L. J. 333; *Munn v. Indus. Bd.*, 274 Ill. 70, 113

A fireman, in the fire department of the civil administration under the Isthmian Canal Commission, was injured while assisting in extinguishing a fire which had broken out in a building in Colon. The place where he sustained his injuries was without the limits of the Canal zone. It was held that the man acted in an emergency, and the fact that he was without the limits of the territory under the control of the United States, was not under these circumstances, sufficient, to exclude him from the operation of the act.³²

Two butcher boys were employed on a wagon, and one fell off and was injured. A bystander volunteered to ride home on the wagon in order to assist in caring for the injured boy. On the way home the volunteer bystander fell off and was injured, and sought to hold the master liable on the grounds of implied authority of the driver to hire a person in the case of an emergency. The court held that there was no such implied authority and dismissed the case.³³

An employee, who was left in temporary charge of machinery, was injured when he attempted to remove a belt to prevent its burning, when some of the machinery got out of gear. It was held that the injury arose out of the employment.³⁴

Where a demonstrator of automobiles, fearing a collision, threw out his arm to protect himself, and his arm was broken, it was held that the injury arose out of the employment.³⁵

A laborer fell and sustained injuries when attempting to get away from the danger zone where a blast was to be set off. It was held that he sustained injuries arising out of the employment.³⁶

§ 323. **Erysipelas.**—Where an employee suffered from erysipelas, which originated from the infection of a pimple on his face, it was held that, in the absence of any showing that the in-

N. E. 110; *Alexander v. Indus. Bd.*, 281 Ill. 201, 117 N. E. 1040. 1 W. C. L. J. 313.

32. *Re James Nellis*, Op. Sol. Dep. C. & L. p. 221.

33. *Houghton v. Pilkington*, 107 L. T. R. 235.

34. *Blackford v. Green & Pierson*, 37 N. J. L. J. 279.

35. *Todd v. Drouet & Page Co.*, 3 N. Y. St. Dep. 351, 12 N. C. C. A. 178.

36. *Catardi v. Bridgeport Contracting Co.*, 4 N. Y. St. Dep. 410.

fection came from anything connected with the employment, it could not be said that the injury arose out of the employment.³⁷

§ 324. **Explosions.**—A station agent was injured by an explosion, as the result of pouring kerosene upon live coals. The rules of the company forbade the use of kerosene in this manner. It was contended that the employee had added risk to his employment, and therefore the accident did not arise out of the employment. On appeal, the court, in affirming a finding that the accident arose out of the employment, said: "A peril which arises from the negligent or reckless manner in which an employee does the work which he is employed to do may, in many cases, be held to be a risk incidental to the employment; and the same is true where he performs an authorized act in a forbidden manner, a distinction being taken in this regard from cases in which the act is altogether outside of, and unconnected with, the employment. Here the agent was rightfully and properly attempting to start a fire, but carelessly used the wrong kind of kindling. This was not a conscious, voluntary choice between a safe and dangerous way to do his duty, but a careless use of a combustible, which careless use endangered his life and seriously injured him, but just such a careless use as was frequently made of kerosene by the station agents of the defendant and such a use as might be likely to result from the employment."³⁸

A traveling salesman for chemical compounds was killed as the result of an explosion in a creamery, where he had gone to sell soda and alkali. It was contended that, while the accident occurred in the course of the employment, it did not arise out of it. The commission found that the accident arose out of the employment, and the court on appeal unanimously affirmed the award.³⁹

An electrician was severely injured by the explosion of a dynamite cap, when he lighted a match for the purpose of smoking a cigarette upon his arrival in the morning at the place of employ-

37. *Miller v. Libby & Blinn*, 1 Conn. C. Dec. 377.

Note: See. § 184 ante.

38. *Benson v. Bush*, 104 Kan. 198, (1919, 178 Pac. 747, 3 W. C. L. J. 629, 18 N. C. C. A. 1026.

39. *Cain v. United Breeder's Co.*, 224 N. Y. 568, 120 N. E. 858, 17 N. C. C. A. 938.

ment. The use of dynamite caps was common in certain branches of the employment, but there was nothing in the evidence to account for the presence of a dynamite cap in that particular place. In holding that the injury arose out of and in the course of the employment, the court said: "It arose in the course of the employment because of the fact that it occurred when the employee was at his place of work ready to begin his duties. A causal connection between the employment and the injury * * * is shown by the use of dynamite caps upon the premises and the presence thereof in the room where the plaintiff was regularly employed. It is apparent that plaintiff had no reason to anticipate the presence of dangerous explosives in the building where he was employed. It is true he did not, in the course of his employment, have anything to do with dynamite caps, nor was he ordinarily exposed to any hazard on account of the presence and use thereof by defendant upon the premises; but they were used by the defendant. That the legitimate use thereof was confined to parts of the premises remote from the building in which the accident occurred does not necessarily relieve the master from the duty to make compensation under the act to a servant, injured by the explosion of a dynamite cap in a part of the premises which ordinarily, and under the rules of the master, is free from danger on account thereof. The commissioner did not find that plaintiff took the explosive into the building where the accident occurred, and culpability upon his part causing the injury is not shown by evidence of fellow workmen that some time later they found a dynamite cap in a pocket of his overalls, which they took from a locker in which plaintiff kept them." ⁴⁰

Where a miner was killed as the result of an explosion and the evidence was conflicting on the question as to whether the death was due to an accident or suicide, the court, in holding that the death was due to an accident arising out of the employment, said: "Other facts and circumstances are mentioned in the testimony, most of them unimportant and none or all of them conclusive of either theory. If death is not the result of suicide, the employer

40. *Rish v. Iowa Portland Cement Co.*, — Iowa —, 170 N. W. 532, (1919), 3 W. C. L. J. 463, 18 N. C. C. A. 1032.

must respond. The evidence may be too meager to establish affirmatively either accident or suicide, but when violent death is shown, the presumption arises that it was not self-inflicted. 'As between accident and suicide the law for logical, and sensible reasons supposes accident,' until the contrary is shown. * * * The evidence is surely not conclusive of suicide. We conclude that the determination of the trial court that death was accidental is sustained."⁴¹

Where a brewery employee was severely burned, as the result of an explosion occurring in the course of his employment, and later died of Miliary tuberculosis, and the medical testimony was to the effect that the disease was due to the accident, the court held that the evidence was sufficient to justify a finding that death was caused by an accident arising out of and in the course of the employment.⁴²

An employee of an oil company engaged a man temporarily to assist him in placing a flywheel on a gasoline engine. In doing so an explosion occurred, killing both men. The case was reversed on other grounds, but the court said, with reference to the contention that deceased was not an employee. "We think there is no merit in the contention of the insurance carrier that Tillburg was not in the employ of the owners of the lease. Bacon appears to have had authority to hire such incidental help as might be necessary in the operation of the lease."⁴³

Where an employee was killed by an explosion which occurred on the premises of his employer, while the employee was off duty and engaged in his own personal duties, it was held that the accident did not arise out of the employment.⁴⁴

Where an employee in a bakery was injured by an explosion of natural gas, used for heating ovens, which explosion was due to

41. *State ex rel. Oliver Iron Mining Co. v. District Court of St. Louis Co.*, 138 Minn. 138, 164 N. W. 582, 15 N. C. C. A. 526.

42. *Heileman Brewing Co. v. Schultz*, 161 Wis. 46, 152 N. W. 446, 15 N. C. C. A. 643.

43. *Gillburg v. McCarthy & Townsend*, 179 N. Y. App. Div. 593, 166 N. Y. S. 878, 15 N. C. C. A. 449.

44. *Brienen v. Wisconsin Public Service Co.*, 166 Wis. 24, 163 N. W. 182, 15 N. C. C. A. 289.

the negligence of the employer's foreman, it was held that he sustained an injury arising out of the employment, within the meaning of the act.⁴⁵

Where an employee was killed by an explosion while carrying powder from a storehouse to a place in the mine where it was to be used, it was held, in the absence of a showing of what caused the explosion, that the accident occurring while deceased was performing his duties was sufficient to sustain a finding that the accident arose out of the employment.⁴⁶

"Employer and employee were killed by the same accident, which was the explosion of an ammonia tank. For the prosecutor it is claimed that there is nothing in the evidence to support a finding by trial court that the accident arose out of and in the employment. The facts are substantially as follows: Botkin was in the wholesale milk business; Mankowitz was his son-in-law, and described by the witnesses as his right-hand man. The evidence justified the conclusion that he was Botkin's general utility man. Botkin had a creamery at Whitehouse, N. J., from which he seems to have obtained most of his milk, and he visited it once a month or Mankowitz did for him, to pay off the farmers, and attended to the disbursements generally. Also Botkin had organized a corporation called the Interstate Milk & Creamery Company, of which Mankowitz was to be manager and director; one Ellis, Botkin's bookkeeper, was also to be a director, and the testimony is that when this concern actually began operations, Botkin was to give up his private business and turn it all over to the Interstate; Mankowitz was then to cease being Botkin's manager, and apparently the whole business was to undergo a transformation into the Interstate concern. The formal organization seems to have been completed by the day of the accident, but operations had not begun. In fact, there was to be an informal meeting of the directors to witness a test of an ammonia tank, intended to be used for refrigerating purposes. Mankowitz came to Botkin and said; 'We have to go to Whitehouse'; Botkin responded; 'We must go to the Interstate first.'

45. *Adams v. Iten Biscuit Co.*, (Okla.), 162 Pac. 938.

46. *Pugh v. Earl Dudley*, (1914), 7 B. W. C. C. 528.

The matter was settled by their going to the Interstate, and, while they were witnessing the test, the tank exploded and both were killed. This is the situation which petitioner claimed constituted an accident arising out of and in the course of Mankowitz's employment. Judge Osborne so found, and this certiorari is to test the propriety of that finding. The case was a close one, but we are inclined to think that the finding can be sustained. It is true that Mankowitz was there as a director of the Interstate Company, but in our judgment that did not prevent his being there also as the right-hand man of Botkin. The latter was president and principal owner of the Interstate company, and the testimony is entirely consistent with a finding that Botkin wanted Mankowitz there to advise him, as president and principal owner, whether the money that he (Botkin) had put into the company should be invested in this particular tank; in short, that Mankowitz was there in a dual capacity, as manager of the new company, and also as Botkin's adviser and right-hand man. The interests of the two were substantially identical, so that there is no difficulty about a conflict of the interest. It was just as much Botkin's interest that there should be a good ammonia tank as it was that of the company. We think that in this aspect of the case the finding that Mankowitz was in the employment of Botkin and doing his work at the time of the accident was justified, and this leads to an affirmance of the judgment below."⁴⁷

Where an employee while adjusting the canopy top of a gasoline delivery tank, fell under the wagon and was injured, the court said:

"The deceased came to his death as found by the Industrial Board, through an accident which occurred in the course of and arising out of his employment. Plaintiffs in error were engaged in a business that was extrahazardous under the act, and the deceased was working for them as a driver of one of their wagons. Such work was necessary in carrying on the principal business of the plaintiff in error. We think the occupation of the deceased was sufficiently connected with the extrahazardous business of the

47. *Newman v. Mankowitz*, (1919), 108 Atl. 179, 93 N. J. L. 473, 5 W. C. L. J. 296.

plaintiffs in error, ('any enterprise in which explosive materials are manufactured, handled, or used in dangerous quantities.' [Callaghan's 1916, St. Supp. § 5475 (b) (6)]), and such business being under the act, his widow was entitled to recover under its provisions.⁴⁸

§ 325. **Exposure.**—The applicant was compelled to work in hot pulp for a considerable time. The next day he was stiff and sore, and later developed acute nephritis. The court held that the disability was due to an accident, and that the accident arose out of the employment.⁴⁹

Claimant was compelled to jump into the river in order to save himself, when one of the timbers of the crane upon which he was working broke. He waded to shore and as a result of the exposure developed pleurisy and pulmonary tuberculosis, causing disability. The court held that the disability from exposure was due to the accident arising out of the employment.⁵⁰

Where applicant was exposed to cold and dampness for 8 hours while he was bailing out a mine, and developed subacute rheumatism as a direct result of the exposure, it was held that the disability was due to an accident arising out of the employment.⁵¹

Where a brewery fireman was forced to walk some distance through a heavy snowfall to work, which exhausted and wet him, and he worked an extra long shift thereafter, exposed to changes of temperature, subsequent to which he contracted pneumonia, from which he died, it was held that the death was not due to an accidental injury arising out of the employment. The court said: "We are not at liberty to construe the act so as to include diseases

48. *Gibson v. Indus. Bd.*, 276 Ill. 73, 114 N. E. 515, 16 N. C. C. A. 636.

Note: For further cases on explosions see "Act Not Constituting Wilful Misconduct," § 283 note 26, 16, 97, 23, 12; See "Chauffeur" § 314 note 47 See "Acts For Personal Convenience or Pleasure" § 288 note 14; Miscellaneous Accidents In War Zone" Note 47, "Lunch Hour Injuries," notes 80 and 84.

49. *United Paperboard Co. v. Lewis*, 64 Ind. App. —, 117 N. E. 276, 15 N. C. C. A. 686.

50. *Rist v. Larkin & Sangster*, 171 N. Y. App. Div. 71, 156 N. Y. S. 875, 15 N. C. C. A. 688.

51. *Glasgow Coal Co., Ltd. v. Welsh*, (1916), W. C. & Ins. Rep. 79, 15 N. C. C. A. 690.

which are caused by accident without the intervention of bodily injury.”⁵²

Colds resulting from exposure are not accidental injuries arising out of the employment, unless the particular nature of the employment subjects the servant to a greater hazard of this nature, than he would be subjected to otherwise.⁵³

Malarial fever resulting from exposure to hot sun and heat of a forest fire, together with overexertion is under the Federal Act a compensable injury arising out of the employment.⁵⁴

Pneumonia alleged to be caused by exposure and wet feet was held not compensable under the Federal Act, because it was found that the weight of medical authority is to the effect that these conditions will not directly cause pneumonia.⁵⁵

§ 326. **Eye Injuries.**—Plaintiff was injured in an accident on a logging railroad. Shortly thereafter the sight of his left eye, which previously had been good, began to fail and became blind. There was no evidence that the atrophy of the optic nerve was due to lues or any germ carrying disease. “These physical facts, coupled with the opinion of reputable oculists that the condition may have resulted from the accident is enough to sustain the judgment of the court below,” awarding compensation.⁵⁶

A miner, after finishing his work for the day, changed his clothes and started to leave the mine, when he struck his face against a projecting piece of slate and destroyed one of his eyes. The court held that until the miner was safely away from the mine he was

52. *Linnane v. Aetna Brwy. Co.*, 91 Conn. 158, 99 Atl. 507, 15 N. C. C. A. 691.

53. *In re Geo. L. Snider*, 3rd A. R. U. S. C. C. 118; *In re F. W. Wilson*, 2nd A. R. U. S. C. C. 154.

Note: See *Sunstroke*, *Heatstroke*, *Freezing*.

54. *In re Archie A. Arbuckle*, 3rd A. R. U. S. C. C. 127; *In re Angus S. Nicholson*, 2nd A. R. U. S. C. C. 67.

55. *In re Wm. J. Lehr*, 2nd A. R. U. S. C. C. 183; *In re Edward Thomas Obrien*, 2nd A. R. U. S. C. C. 183.

56. *Nelson v. Industrial Insurance Department*, 104 Wash. 204, 176 Pac. 15, 3 W. C. L. J. 199, 17 N. C. C. A. 1057; *Pawling & Harnischfeger v. Mildenerger*, 170 Wis. 146, (1919), 174 N. W. 455, 5 W. C. L. J. 121.

not without the protection of the act, and therefore the accident arose out of and in the course of the employment.⁵⁷

Where the claimant suffered an injury to his eye, and the defendant sought to defeat a recovery by showing that after claimant had visited a physician he took it upon himself to treat his eye by the use of a potato poultice, which, defendant alleged, destroyed the sight of the eye, the court, in affirming an award, said that, in view of the fact that claimant was a man of limited education, no more knowledge could be expected of him than he actually possessed, and in the present case his conduct was not so unreasonable as to defeat a recovery.⁵⁸

The claimant, a night watchman, suffered the loss of his eye as the result of some foreign substance blowing into it as he was closing a window during a storm. The commission found that the injury was due to an accident arising out of the employment, and on appeal the court held that, as there was no evidence that the business was in operation, it must be assumed that the business was in operation, and in such case the claimant was exposed to the hazards of the business, and that it was immaterial that the particular act that he was doing was not an act peculiar to the business which was being conducted.⁵⁹

Where a coal miner's eye was injured by a small particle of rock flying from a sledge, but the evidence was that his vision was not affected by the accident, compensation will not be allowed.⁶⁰

Where an employee sustained a burn, followed by impaired vision, it was held that the evidence justified a finding that the impaired vision was due to the burn. There was evidence that prior to the burn claimant's vision was good, and opposed to this

57. *Sedlock v. Carr Coal Mining & Mfg. Co.*, 98 Kan. 680, L. R. A. 1917B, 372, 159 Pac. 9, 15 N. C. C. A. 237.

58. *Riley v. Mason Motor Co.*, 199 Mich. 233, 165 N. W. 745, 15 N. C. C. A. 78.

59. *Kobyra v. Adams*, 176 N. Y. App. Div. 43, 162 N. Y. S. 269, 15 N. C. C. A. 217.

60. *Perry County Coal Corp. v. Indus. Comm.*, — Ill. —, 128 N. E. 333, 6 W. C. L. J. 653.

was expert testimony that they never heard of a case of this kind which would cause impairment of vision.⁶¹

§ 327. **Falls From Vertigo or Other Like Causes.**—An employee, whose business was to see that yarn was wound around a revolving cylinder, was killed when he fell on a machine, so that his neck was torn open and the carotid artery was cut. Medical testimony was to the effect that the fall was caused by a pre-existing diseased condition. The court held that, even though the cause of the fall was the diseased condition of decedent, it was a remote cause and the fall itself was the dominant and proximate cause which placed the body of the employee in such relation to the revolving parts of the machine as to result in an injury causing death. "Indisputably the injury occurred during the course of the employment, and the fall into the machine was from the front of the machine where the employee was standing in the active performance of his duty. The real question is not so much the cause of the fall or whether the fall as such arose out of the employment, but whether the risk and harm of a fall into or upon machinery then in use by an employee are incidents of that business and hazards to which the workman would have been exposed apart from that business. *McNicol's Case*, 215 Mass. 497, 499, 102 N. E. 697, L. R. A. 1916A, 306, 4 N. C. C. A. 522; *Wicks v. Dowell*, (1905), 2 K. B. 225. We think the injury arose out of and in the course of the employment. *Brightman's Case*, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321; *Mooradjian's Case*, 229 Mass. 521, 118 N. E. 951; *Hallett's Case*, 230 Mass. 326, 328, 119 N. E. 673."⁶²

Where a water boy, whose duties required him to distribute drinking water to the different working men on a building, fell down an elevator shaft, and no one saw or knew anything about the circumstances of the fall, the commission found that the fall was due to an accident arising out of the employment, and where

61. *Raina v. Standard Gaslight Co. of N. Y.*, 183 N. Y. S. 264, (1920), 6 W. C. L. J. 490.

62. *Dow's Case*, 231 Mass. 348, 121 N. E. 19, 3 W. C. L. J. 144; *In re Stanley Lonowski*, 3rd A. R. U. S. C. C. 122.

there is evidence to support such finding it will not be disturbed on appeal.⁶³

Where an employee fell in the course of the employment and died later, the evidence of medical experts after performing an autopsy was to the effect that the fall which caused death was due to a blood clot on the brain caused by a previous injury, and therefore the death was not due to an accident arising out of and in the course of the employment.⁶⁴

Applicant, a man of 71 years of age, fell, striking his head, causing a scalp wound. Prior to the accident he had slight attacks of dizziness and weak spells, but they never caused him to fall. There was testimony to the effect that applicant was never seen to fall prior to the accident, and that there were nails protruding from the floor where applicant worked and on two occasions he had tripped on the nails, and that there was no way of accounting for the fall other than tripping on the nails. Affirming an award, the court said: "While plaintiff testifies that at times he had been dizzy and weak, he also testifies that it was nothing to speak of, but slight, and never sufficient to cause him to lose his balance and fall. His fellow workmen and superiors in the plant who saw him daily never noticed any appearance of dizziness or fainting, and never saw him fall before. The fact that he did not recall just how the accident happened is in no way extraordinary, when we contemplate that in the fall he struck his head with sufficient force to inflict a gash in his scalp. He was over 70 years of age, not as nimble as in his younger years, and had had trouble with his limbs and feet a short time before. We are not persuaded that we should say, as matter of law, that the cause of the accident under the evidence in the case is so conjectural as to require us to set aside the finding and award of the board." ⁶⁵

63. *Gabriel v. A. J. Smith Const. Co.*, 206 Mich. 470, (1919), 173 N. W. 195, 4 W. C. L. J. 504.

64. *Hansen v. Turner Const. Co.*, 224 N. Y. 331, 120 N. E. 693, 17 N. C. C. A. 786, 3 W. C. L. J. 168; *Cox v. Kansas City Ref. Co.*, — Kan. —, (1921), 195 Pac. 863.

65. *Wilson v. Phoenix Furniture Co.*, 201 Mich. 531, 167 N. W. 839, 2 W. C. L. J. 327.

"The claimant, a brickmaker, was required to perform his duties while standing on a pile of brick about 15 feet above the ground. He was seized 'with an attack of vertigo, or with some similar disorder, which caused him to fall to the frozen ground.' 'It is urged that his injury was the result of the vertigo, and not of an accident; but the findings and proceedings indicate that he was in good health at the time, and no reason is given for the fall except the dizziness. The natural inference is that the dizziness, the fall, and the injury resulted from the elevated position in which he was standing while performing his work.' The injury was held to be due to an accident arising out of the employment."⁶⁶

An assistant foreman, in the employ of the street department of a gas company, while pursuing the duties of his employment, suddenly fell to the street and later died in a hospital. An autopsy revealed that in all probability the fall had been due to an attack of cardiac syncope, to which a previous disposition of the heart disposed it. It was held that the fall and subsequent death was not due to an accidental injury arising out of the employment.⁶⁷

Where a driver, by reason of a fainting fit, fell from a wagon and fractured his skull, it was held that the injury arose out of the employment, because the employee was exposed to a substantial and increased risk owing to his occupation.⁶⁸

Where an employee became faint from vertigo and illness, and fell on a table, injuring herself, it was held that, in the absence of a showing that the faintness was due to a condition of the employment, and not due to her own physical condition, it could not be said that the accident arose out of the employment.⁶⁹

66. *Santa Corce v. Sag Harbor Brick Works*, 169 N. Y. Supp. 695, 182 N. Y. App. Div. 442, 1 W. C. L. J. 1132, 17 N. C. C. A. 787; *Board of Comm'rs of Greene Co. v. Shertzer*,— Ind. App. —, (1920), 127 N. E. 843, 6 W. C. L. J. 310; *Miller v. Biel*, 127 N. E. 567, 6 W. C. L. J. 315.

67. *Collins v. Brooklyn Union Gas Co.*, 171 App. Div. 381, 156 N. Y. S. 957.

68. *Driscoll v. Employer's Liab. Assur. Corp.*, 1 Mass. Ind. Acc. Bd. 125; *Hanson v. Commercial Sash Door Co.*, 1 Bull. Ill. Ind. Bd. 30; *Burke v. Mayer*, (1916), 3 Cal. I. A. C. 310; *Crane v. North Star Mines Co.*, 1 Cal. I. A. C. (part 1) 68.

69. *Erickson v. Empire Laundry Co.*, 1 Cal. Ind. Acc. Comm., part 2, 612; *In re Frank Kasobuski*, 3rd A. R. U. S. C. C. 169; *Reeves v. J. A. Dady Corp.*,— Conn. —, 113 Atl. 162 (1921).

Where a salesman, crossing the ferry from San Francisco to Oakland, became nauseated and dizzy, and sustained a fall due to such dizziness, resulting in concussion of the brain, it was held that, in the absence of a showing that the bay was rough or the weather bad, applicant had failed to establish a case of accident arising out of the employment.⁷⁰

A buyer and department store manager became faint, fell, and sustained injuries, while in a bathroom of a hotel during a business trip. It was held that the accident did not arise out of the employment.⁷¹

§ 328. **Falling Objects.**—An apartment building janitress, who received free use of an apartment and a small wage, was injured by falling plaster as she was about to sit down to breakfast in her own apartment. In holding that the accident did not arise out of the employment, the court said: "The case is no different than it would be if the claimant, although janitress of the building in question, had occupied an apartment in another building and the accident had there occurred. In no proper sense can it be said that she was janitress of her own apartment, merely because it happened to be a part of the building of which she was the janitress. In her own apartment she presided over her household affairs and was serving, not her employers, but herself and her family. If this award can be sustained, so also it should be sustained if the plaster had fallen on her at night while she was sleeping, or while doing any ordinary housework for the requirements or convenience of her family. At the time of the accident she was doing nothing for her employers, nor anything incidental thereto. Her duty to them did not require her presence in her apartment. What she was doing was personal to herself. It was entirely disassociated with the work of her employers."⁷²

70. *Van Winkle v. G. S. Johnson & Co.*, 2 Cal. I. A. C. 212.

71. *Jacobs v. Davis Schonwasser Co.*, 2 Cal. I. A. C. 938.

Note: See § 188 ante.

72. *In re Lauterbach*, (1919), 189 App. Div. 303, 178 N. Y. S. 480, 5 W. C. L. J. 100.

Where an employee was carrying a plank to a saw and dropped it upon his toe, thereby injuring the toe, the court held that the evidence was sufficient to justify a finding that the injury arose out of the employment.⁷³

A restaurant dishwasher was injured when the ceiling fell upon her. The cause of the fall was the overloading of the floor above over which the master had no control. It was held that the injury arose out of the employment.⁷⁴

Where a teamster, while driving his employer's team on a street, was killed when a beam fell from a building under construction, it was held that the injury arose out of the employment.⁷⁵

Where a domestic servant lost the sight of an eye as the result of plaster falling into it when she was arising in the morning, it was held that the accident arose out of the employment.⁷⁶

Where a wagon bed suspended by ropes fell upon an employee while asleep and killed him, the court in awarding compensation to his dependents said: "Bollman's employment was not for certain hours of each day, with no obligation to his employer for the remaining hours of the 24, as is usual in employment contracts. By the terms of his agreement, Bollman was required to leave his own domicile, and travel from farm to farm with the threshing outfit, to stay of nights on the premises where the machine happened to be, and as watchman guard and protect it from fire and trespassers. Since he was not only to act as engineer in the operation of the machine, but was to remain overnight and act as watchman, it must be presumed that it was not the intention of the parties that Bollman was to remain awake through each night, but rather that he should sleep on the premises where the machine was left, and be ready for such emergency as might arise. It cannot be said that Bollman could not, and did not, render service to his employer while asleep, though it is not stated that he was asleep at the time of the accident, but that he "had retired in the

73. Mallory's Case, 231 Mass. 225, 120 N. E. 591, 17 N. C. C. A. 941.

74. Kimbol v. Indus. Acci. Comm., 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E, 312.

75. Mahowald v. Thompson Starrett Co., 134 Minn. 113, 158 N. W. 913

76. Alderidge v. Merry, (1912), Ir. Ct. of Appeal, 6 B. W. C. C. 450.

driveway of the barn for the night." Under the facts stated, he had, as had long been his custom, placed himself not far from the property, so that the noise made by trespassers might the more easily awaken him should he be asleep, and so that he could the more quickly reach the property should help be needed. The accident which caused Bollman's death was due to a hazard to which he would not have been exposed apart from his employment. The accident was the result of a risk which was reasonably incidental to the employment. We therefore hold that the death of Bollman was by accident arising out of his employment by Lewellen, see *Chitty v. Nelson* L. R. A. 1916A, 58, note; *Moyse v. Northern Pacific R. Co.*, 41 Mont. 272, 108 Pac. 1062; *Haller v. City of Lansing*, 195 Mich. 753, 162 N. W. 335, L. R. A. 1917E 324.⁷⁷

§ 329. **Frost Bites and Freezing.**—A woodsman, misunderstood his orders and worked at the wrong place, and upon discovering his mistake went to the proper place and worked so much harder than usual in preparing for the next day's drive that his feet perspired and were consequently frozen. On appeal, the court, in holding that the injury was due to an accident arising out of and in the course of the employment, said: "Injury by freezing is certainly not peculiar to the industry in which the defendant Beaulieu was engaged. Did the nature of Beaulieu's employment expose him to a hazard from freezing which was substantially increased by reason of the services which he was required to perform. * * * On the day in question by reason of the mistake, the defendant Beaulieu worked harder than he ordinarily did, as a result of which his feet became wet from perspiration, a circumstance which made them much more susceptible to cold, and as a consequence thereof his feet were froze. It seems clear that the hazard to which the defendant Beaulieu was exposed was one which was incident to and can be fairly traced to his employment as a contributing cause, and that he would not have been equally exposed to such a hazard apart from his employment. If the defendant Beaulieu while engaged in his work had wet his feet by stepping into an open spring and the freezing had resulted there-

77. In re Bollman,—Ind. App. —, (1920), 126 N. E. 639, 5 W. C. L. J. 831.

from, it could scarcely be claimed that the injury was not proximately caused by accident. In this case, the condition of his feet was due to extra exertion caused by reason of a misunderstanding as to orders. Because there would be no logs for hauling in the morning, he was required to put forth an unusual and extra effort, which made him more susceptible to cold than he otherwise would have been. It is clear that the exposure of the defendant Beaulieu to injury by freezing was substantially increased by reason of the nature of the services which he was obliged to render. We think it must be held that the injury for which compensation was awarded was proximately caused by accident within the meaning of the act.⁷⁸

Applicant, an employee of a railroad construction company, worked in the open air from 7 a. m. until 5 or 6 p. m. when the temperature was about 60 degrees below zero. He was cutting a roadway and wore two pair of woolen socks, felt boots and rubbers. The felt boots were in bad condition. When he started to work in the morning his feet were in good condition and in the evening at the close of work they were frozen. In affirming judgement, the court said: "It seems to me to be a forgetting of the words of the statute 'arising out of his employment' to say that all persons engaged in similar work were subject to the same risk. Admit that they were * * * To say that applicant was not exposed to any more special risk than ordinary persons engaged in out-door work simply means that the applicant might be one of a large class of persons exposed to a risk arising out of their employment. You might as well say that a man working in a factory who was struck by a falling board or bar should be disentitled to compensation because all persons working in factories are liable to have that happen to them. Simply because you can discover or describe a class of workmen who are generally exposed to such a risk and find the applicant to be one of that class seems to me to be no valid reason for refusing him compensation or for saying that his injury did not arise out of his employment. People who are not employed at all do not kick around in the snow when

78. *Ellingson Lbr. Co. v. Indus. Comm. of Wis.*, 168 Wis. 227, 169 N. W. 568, 3 W. C. L. J. 215, 11 N. C. C. A. 1003.

it is 60 degrees below zero. People who are employed as waiters in a comfortable hotel are not exposed to frostbites. * * * It was because he was so employed that the applicant was exposed to the risk, and I see no reason for excluding his case from the words of the statute because you can discover other people whose employment similarly exposed them. Upon that principle no man could recover if you could show that a group of other people were exposed in the course of their employment to similar risks.'⁷⁹

"The court of cassation has held several times in France that as a rule the Statute of April 9th, 1898, does not cover accidents due to the forces of nature even though they occur in the course of the employment. Nevertheless if the employment has contributed to the bringing into play of these forces, or has provoked or aggravated its effects, then the accident falls within the statute, according to the court of cassation. Thus, as a general principle, the employer is not responsible for damages caused to his workmen by lightning, storms sunstroke freezing, earthquakes, floods, etc. These are considered as '*force majeure*,' which human vigilance and industry can neither foresee nor prevent. The victim must bear alone such burden, inasmuch as human industry has nothing to do with it and inasmuch as the employee is no more subject thereto than an other person. This is, says Loubat (Le Risque Professional No. 504), what Mr. Lion Say called 'the great professional risk of humanity.' Every human being is liable to suffer from events in which he has no share of responsibility. There is here between the accident and the employment no relationship of cause and effect. Hence it cannot be said of such an accident that it arises out of or in the course of employment. But where the work, or where the conditions under which it is carried on, expose the employees to the happening of a *force majeure* event or contribute to bring it into play or to aggravate its effects, then we are no longer face to face with the sole forces of nature. This is no longer a risk to which everybody is exposed. This is a danger which threatens more particularly the employees who work under special conditions. Hence the occurring of a *force majeure* event

79. Nikkiczuk v. McArthur, 9 Alta. 503, 28 Dom. L. 279, 15 N. C. C. A. 632.

under such circumstances is an accident arising out of the employment." ⁸⁰

A seaman at work on his ship sustained a frostbite. The judge found that the workman had not proved that the frostbite was due to any particular circumstance in connection with his employment or that he had been exposed to any unusual risk. It was held that the accident did not arise out of the employment. ⁸¹

§ 330. **Gangerene Resulting From Injury.**—Where a gatekeeper, on a road under construction, had his foot crushed while opening a gate to allow a truck to pass, and the foot became gangrenous, resulting later in the death of the gatekeeper, the court held that the accident arose out of and in the course of the employment. ⁸²

§ 331. **Glanders.**—Where a stableman contracted glanders as the result of caring for a horse infected with that disease, the court, in denying that the death was due to an accident arising out of the employment, said: "Glanders cannot be differentiated from other diseases by the fact that ordinarily it is a disease which affects a horse rather than a human being, for it cannot matter whence the bacteria have proceeded which set up disease within the human body. Anthrax is a disease which commonly affects sheep and cattle, and is communicable from them to man, yet of the effects of anthrax it was said in *Bacon v. U. S. M. A. Ass'n*, supra: 'The difference between the cause of this condition and the causes of typhoid fever, tuberculosis, smallpox, scarlet fever, and such like diseases, is that this particular condition is caused by different bacilli from the others and they come in contact with

80. *The Canada Cement Co. v. Pazuk*, 22 Que. K. B. 432, 12 D. L. R. 303, 7 N. C. C. A. 982; *Warner v. Couchman*, L. R., (1911), 1 K. B. 351, 1 N. C. C. A. 51. See *Savage v. City of Pontiac* — Mich — 183 N. W. 798.

81. *Karemaker v. S. S. "Corsican"* (owners of) 4 B. W. C. C. 295, (1911), 6 N. C. C. A. 708; *Dorrance v. New England Pin Co.*, Conn. Super. Ct., 1 Nat. Comp. Journ., (1914), 23, 6 N. C. C. A. 709.

Note: See § 192 ante.

82. *Doherty v. Grosse Isle Tp.*, 205 Mich. 592, 172 N. W. 596, (1919), 18 N. C. C. A. 1030, 4 W. C. L. J. 222.

Note: See § 194 ante.

the skin or enter into its pores, while in the other cases they are generally breathed in.' Except that the bacilli differ, glanders does not differ from the diseases named in the quotation. We think that for legal purposes glanders is a disease which, when contracted without previous accidental injury occurring in the course of employment, cannot be classed under the Workmen's Compensation Law of this state as an accidental injury arising out of and in the course of employment. We therefore conclude that the question should be answered in the negative, the award reversed, and the claim dismissed." ⁸³

§ 332. **Heart Disease.**—An employee, engaged in bailing scrap copper, was found dead near the baling press, with a completed bale of copper beside him, and there was no evidence of accident, but it was claimed that the heavy work deceased was doing hastened his death by heart and kidney disease. In holding that the death was not due to an accident arising out of the employment, the court said: "In this case there was no evidence tending to prove any accident or accidental injury to the deceased. There was no mark upon his person, and nothing from which it could be inferred that an accident had occurred, and it is not claimed that there was any accident, but only that the heavy work which he was doing in the ordinary course of his employment caused or hastened his death." ⁸⁴

A laborer slipped and fell against the lever of a machine he was operating, and received a blow over the heart, and in a few days died. A physician testified that a blow over the heart would cause acute disease, and in the case of deceased it brought on a condition known as pericarditis. The court held that, in consideration of all the evidence, there was a sufficient showing that the accident arose out of and in the course of the employment, and that such injury proximately caused his death. ⁸⁵

83. *Richardson v. Greenburg*, 188 App. Div. 248, (1919), 176 N. Y. S. 651, 4 W. C. L. J. 433.

84. *Jakub v. Indus. Comm.*, (1919), 123 N. E. 263, 288 Ill. 87, 4 W. C. L. J. 153.

85. *Bucyrus v. Townsend*, 64 Ind. App. —, 117 N. E. 565, 15 N. C. C. A. 646, 1 W. C. L. J. 166; *Insana v. Nordenholt Corp.*, 118 N. Y. S. 83, (1920), 6 W. C. L. J. 478.

A foreman fell while sweeping pebbles off a paving, and later died. An autopsy revealed that his fall resulted in a fracture of the skull, and that the fall was probably due to heart syncope to which the previous condition of the heart predisposed it. In reversing an award in claimant's favor, the court held that there was no evidence to sustain the finding of the commission that deceased's death was accidental or that it arose out of the employment.⁸⁶

Where a cook on a lighter, who was suffering from valvular disease of the heart, in attempting to save some of his clothes when the vessel began to sink, so aggravated the disease by his exertions and excitement that he died, it was held that his death arose out of and in the course of his employment.⁸⁷

A bus driver fell from his bus and later died. The evidence was conflicting as to the cause of the fall. The court held that it was more probable that death was caused by a sudden fatal heart attack than that it was caused by an accidental fall aggravated by the state of the heart. The judge also found that the applicant had failed to prove that the accident arose out of the employment. On appeal this finding was affirmed.⁸⁸

A woman, compelled to over exert herself while pulling carpet in a manufacturing establishment, aggravated a previous condition of weak heart, thereby totally incapacitating herself for work. The court held this to be an accidental injury and that it arose out of the employment, as the pulling of the carpet, although not requiring such putting forth of muscular power as would affect a healthy person, still in the case of this woman, might have been sufficient to cause the injury and would be regarded as the proximate cause.⁸⁹

A workman, employed in loading heavy bags on trucks, fell and died soon after pushing a truck away which he had just loaded. The medical testimony was to the effect that a condition of fatty degeneration of the heart existed, but not in such a stage as to

86. *Collins v. Brooklyn Union Gas. Co.*, 171 N. Y. App. Div. 381, 156 N. Y. S. 957, 15 N. C. C. A. 647.

87. *In re Brightman*, 220 Mass. 17, 107 N. E. 527, 8 N. C. C. A. 102; *Winter v. Atkinson Frizelle Co.*, 37 N. J. L. J. 195, 11 N. C. C. A. 180.

88. *Thackway v. Connelly & Sons*, 3 B. W. C. C. 37, 8 N. C. C. A. 106.

89. *In re Madden*, 222 Mass. 487, 111 N. E. 379, 14 N. C. C. A. 539.

cause death in the absence of a strain. The court held that the evidence justified a finding that the man died from a strain arising out of and in the course of the employment.⁹⁰

An employee, who was suffering from a weak heart, sustained an electric shock and died. The evidence was conflicting as to whether the death was due to an accident or to natural causes. The board found that the death was due to an accident arising out of and in the course of the employment.⁹¹

It has been held that an incapacitating injury to the heart through influenza contracted by reason of the employee's special exposure to the disease at the employer's request to aid other employees, was compensable under the California Act.⁹²

§ 333. **Heat Stroke and Sun Stroke.**—Where an employee suffered a sunstroke, the board found that the injury arose out of and in the course of his employment. In affirming the award on appeal, the court said: "On all the evidence the board was warranted in finding that the employee's injury arose out of his employment. The place where he worked was a pit, with banks which attracted the extreme heat and shut off the air, except from the south. The nature of his work required him to remain at it steadily. The board well might find as a fact that the location and nature of the work peculiarly exposed the employee to the danger of sunstroke; in other words, that the risk of injury by sunstroke was naturally connected with and reasonably incident to his employment, as distinguished from ordinary risk to which the general public is exposed from climatic conditions *per se*. *McManaman's Case*, 224 Mass. 554, 113 N. E. 287; *Mooradijian's Case*, 229 Mass. 521, 118 N. E. 951; *Hallett's Case*, 121 N. E. 503, Jan. 13, 1919; *Morgan v. Owners of Steamship Zenaida*, 2 B. W. C.

90. *Doughton v. Alfred Hickman, Ltd.*, (1913), W. C. & Ins. Rep. 143, 6 B. W. C. C. 77, 8 N. C. C. A. 103; *Trodden v. T. M. Lennard & Sons, Ltd.*, 4 B. W. C. C. 190, 8 N. C. C. A. 103.

91. *Western Electric Co. v. Indus. Comm.*, 285 Ill. 279, 120 N. E. 774, 3 W. C. L. J. 107.

92. *Engels Copper Mng. Co. v Indus. Comm.*. — Cal. —, 192 Pac. 845, 6 W. C. L. J. 624.

Note: For further cases on heart failure or disease see § 197 ante.

C. 19; *Davies v. Gillespie*, 5 B. W. C. C. 64; *Kanscheit v. Garrett Laundry Co.*, 101 Neb. 702, 164 N. W. 708; *State ex rel. Rau v. District Court, Ramsey County*, 138 Minn. 250, 164 N. W. 916, L. R. A. 1918F, 918; *Hernon v. Holahan*, 182 App. Div. 126, 169 N. Y. Supp. 705.⁹³

Where a coal hauler suffered from sunstroke while unloading coal, the court said: "Speaking more specifically upon the subject of exposure as a factor in determining whether a resulting injury is to be regarded as arising out of the injured person's employment, we said that the test was to be found in the answer to the inquiry whether or not the employee was injured as a result of a greater exposure to the cause of injury than that to which persons generally in that locality were subjected. 90 Conn. 309, 97 Atl. 322, L. R. A. 1916E, 584. In *Ahren v. Spier*, 93 Conn.—, 105 Atl. 340, we reiterated the same principle in substance, when we said that: 'An employment will be the proximate cause of an injury when it is the natural and necessary incident of the employment or when the employment brings with it greater exposure to injurious results than those to which persons generally in that locality are exposed, and such injurious result occurs in the course of that employment.' The commissioner's finding in the present case is that the deceased's exposure was far greater than that of the community generally, and the risk from heat and the effects of the sun substantially greater than that of the community. Applying the prescribed test to these facts as found, the right of the claimant to receive an award of compensation is established if the finding is to stand. The reasons why it should not stand are not apparent to us. Conditions indicative of the deceased's special exposure to risk from the effects of the sun and heat are not to be sure, as pronounced as they are in the case of the heat victim in *Ahern v. Spier*, 93 Conn.—, 105 Atl. 340. But the subordinate facts found plainly disclose the existence of such conditions. Cunningham, at the time he was overcome, was

93. *McCarthy's Case*, 232 Mass. 557, 123 N. E. 87, 4 W. C. L. J. 96; *Hernon v. Holahan*, 182 N. Y. App. Div. 126, 169 N. Y. S. 705, 1 W. C. L. J. 1120, 17 N. C. C. A. 1001; *Dougherty's Case*, — Mass. —, (1921), 131 N. E. 167.

engaged in shoveling coal, a task alike strenuous and well calculated to aggravate the normal effects of a superheated atmosphere and the rays of a hot sun. He was shoveling coal from a wagon which presumably from its use, was blackened with coal dust, and therefore especially attractive of the sun's rays. As he was shoveling he necessarily disturbed the coal, thus presumably discharging into the air he breathed more or less dust. It is apparent, therefore, that his employment differentiated his exposure to physical harm from that to which the members of the community generally were exposed. The peril which he faced was made up, not merely of the conditions produced by the heat and the rays of the sun beating down upon him, but of those conditions, plus those other aggravating ones which attended the work which he was doing in the pursuit of his employment."⁹⁴

A coal shoveler suffered sunstroke while unloading coal. In holding that the accident arose out of and in the course of the employment the court said: "This untoward event or unexpected condition under which Ahern's work was carried on therefore constituted an accident which directly and contemporaneously caused this localized abnormal condition. We conclude that under authority of our decisions Ahern's death from sunstroke was a compensable injury. The second question, 'whether Ahren was exposed to such risk as to make the results thereof compensable,' is determined by ascertaining whether the sunstroke arose 'in the course of and out of his employment.' It clearly appears that he was doing what he was employed to do when he was stricken; hence the sunstroke did occur in the course of his employment. 'An injury "arises out of" an employment when it occurs in the course of the employment and as a proximate cause of it.' *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320, L. R. A. 1916 E. 584. An employment will be a proximate cause of an injury when it is the natural and necessary incident of the employment, or when the employment brings with it greater exposure to injurious results than those to which persons generally in that locality are exposed, and such injurious result occurs in the course of the employment. *Larke v.*

⁹⁴ *Cunningham v. Donovan*, 93 Conn. 313, (1919), 105 Atl. 622, 3 W. C. L. J. 584, 18 N. C. C. A. 1024.

John Hancock Life Ins. Co., *supra*. The finding explicitly brings this case within this rule. It does appear that the sunstroke was an incident of Ahern's employment. And that his exposure and risk to sunstroke in this employment was far greater than that of the rest of the community. This is the final test applied by us in the Larke Case. That Ahern was not exposed to sunstroke in greater degree than others in the same employment, and than many other out-of-door workers, we hold to be immaterial, as we did in the Lake Case.'⁹⁵

Where a brewery driver died as the result of a sunstroke, the commission found that the heat prostration resulting in the death of decedent was an accidental injury arising in the course of his employment but not out of it. Affirming the decision, the court said: "Cases of sunstroke and frostbite, both arising from extreme weather conditions, although of opposite extremes, seem to be analogous. The distinction between those cases and the present case, made by the commission itself, indicates that the commission is under no misapprehension as to the legal question involved, and that its determination herein is based on the belief that the work in which the deceased was engaged did not contribute to his death. * * * It was a question of fact for the commission to determine whether the deceased was specially affected by the severity of the heat by reason of his employment. Although earlier in the day his duties required him to unload a large number of half barrels of beer, he had completed that work and was returning to the brewery. It does not appear how long an interval of time elapsed between the unloading of the beer and his death. He was accompanied by an assistant, who presumably exerted himself as much as the deceased, and who testified that he did not work harder on hot days than on other days, and that he was not specially affected by the heat, except that it caused him to perspire. There was a large umbrella on the wagon as a protection from the rays of the sun: Apparently the deceased was returning from Flushing to New York, and while riding along the highway in the ordinary manner he was overcome by the heat. From all the circumstances,

95. *Ahern v. Spier*, 93 Conn. 151, 105 Atl. 340, 3 W. C. L. J. 221, 18 N. C. C. A. 1027.

the commission was justified in drawing the inference that the heat prostration which caused his death did not arise 'out of' his employment and that conclusion is not reviewable.⁹⁶

Where an employee became overheated and died from the effects of the injury, the court, in affirming an award, said: "There would have been no injury if the business had not existed. The heat and humidity, the corrugated sheet iron in the building, the tarred roof, the poor ventilation, and the dust and particles of matter in the air, all acting together, caused the sickness that brought about the death of the decedent. A stronger man might have lived, but it is enough that the industry brought about this man's death. An accident is an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected. * * * It is our view that compensation is a charge against the industry because the industry itself is responsible for the injury. As applied to this case it may be fairly assumed that plaintiff's decedent would not have died at the time he did but for the fact that he went to the factory on a hot day and worked in a heated building. Held, the death was an accident in the sense that it was unexpected, and it was not such a result as would naturally follow the employment, but grew out of it and the decedent died because of it."⁹⁷

A street laborer suffered from sunstroke, and died a few days later. The court held that the accident arose out of the employment, since there was a substantial normally increased risk, due to the character of the street, coupled with its moist condition, which contributed to the cause of the accident.⁹⁸

Where a plumber, laying and jointing pipes in a trench in a road, was required to stoop a great deal, and suffered from a heat

96. *Campbell v. Clausen-Flanigan Brewery*, 183 App. Div. 490, 171 N. Y. Supp. 522, 17 N. C. C. A. 1001, 2 W. C. L. J. 676.

97. *Young v. Western Furniture and Mfg. Co.*, 101 Neb. 696, 164 N. W. 712, 15 N. C. C. A. 676; *City of Joliet v. Indus. Comm.*, — Ill. —, (1920), 126 N. E. 618, 5 W. C. L. J. 802.

98. *State ex rel. Rau v. District Court of Ramsey County*, 138 Minn. 250, 164 N. W. 916, 15 N. C. C. A. 679; *Maskery v. Lancashire Shipping Co., Ltd.*, (1914), W. C. & Ins. Rep. 290, 6 N. C. C. A. 708.

stroke caused by the excessive summer heat, it was held that this was not an accident and did not arise out of the employment.⁹⁹

Where natural heat is intensified by artificial means, the tendency is to place the injury on the same footing as heat prostration from artificial heat, and to treat an injury resulting therefrom as arising out of the employment. Thus, where a seaman suffered from blindness while working on a blackened steel deck for some hours in the blazing sun, with no shade, while in a port in Hayti at a temperature of 108° and 120° fahrenheit, it was held that the employment involved special exposure to the risk of sunstroke and that the accident arose out of the employment.¹

The English decisions hold that heat prostrations are injuries arising out of the employment, when the prostration was due to artificial heat used in connection with the workman's employment. Thus, it was held that one who suffered from heat prostration while drawing ashpits in a furnace room had sustained an injury arising out of the employment.²

§ 334. **Hemorrhage.**—A steam fitter's helper, who was engaged in tending a boiler for his employer, attempted to move heavy steel "I" beams, which rested about three feet from the floor, by pushing his body against them. He threw his weight into this exertion several times, when he suddenly became weak, and was compelled to sit down and cease work for the remainder of that day, but worked the next day. The following days he grew worse, vomited, blood, and was unable to work thereafter. Defendant contended that the removing of the "I" beams was not with-

99. *Robson, Eckford & Co., Ltd. v. Blakey*, (1912), S. C. 334, 49 Sc. L. R. 254, 5 B. W. C. C., 536, 6 N. C. C. A. 710; *Rodger v. Paisley School Board*, 49 Sc. L. R. 413, 5 B. W. C. C. 547, 6 N. C. C. A. 710.

1. *Davis v. Gillespie*, 105 L. T. 494, 28 T. L. R. 6, 56 Sol. J. 11, 5 B. W. C. C. 64; *Morgan v. S. S. Zenaida*, 2 B. W. C. C. 19, 6 N. C. C. 714.

2. *Ismay, Inrie & Co. v. Williamson*, 77 L. J. P. C. 107, (1908), A. C. 437; 1 B. W. C. C. 232, 6 N. C. C. A. 714; *Johnson v. S. S. "Torrington"* (Owners of), 3 B. W. C. C. 68, 6 N. C. C. A. 715; *Olson v. S. S. "Dorsett,"* (Owners of), (1913), W. C. & Ins. Rep. 604, 6 B. W. C. C. 658, 6 N. C. C. A. 715.

Note: See Title "Sunstroke and Heatstroke," § 249 ante.

in the course of plaintiff's employment, and that he did not suffer and an "accident." The court held that, there was an accident, and the evidence supported a finding that it arose out of and in the course of plaintiff's employment.³

"A workman's employment required him to break rock in a quarry with a 16-pound sledge and load the rock into a car, which was hard work. At noon he was in apparent good health and spirits, and ate all of the lunch which his wife brought to the quarry for him. In the afternoon, while at his working place, and shortly after he was seen beating a large rock with his sledge, he suffered a pulmonary hemorrhage, from which he died before medical aid could reach him. He had been working in the quarry for several months, and before that had worked for three years in the sacking department of a cement plant, an exceedingly dusty place. The defendant insists that the workman died of disease; that is, the injury did not arise out of the employment. The question was one of fact and should have been submitted to the jury. It is not material that the workman's blood vessels were weakened by disease, or that he was predisposed to hemorrhage because, for example, he had breathed the dust of the sacking department for three years. The statute establishes no standard of health for workmen, entitling them or their dependents to compensation, and if the added factor of physical exertion in the employment were required to effect the lesion, and did so, the injury arose out of the employment. That the injury occurred in that way and is referable to a definite time, place, and circumstance, is indicated by the workman's apparent good health and strength, the suddenness and profusion of the hemorrhage, the absence of previous extravasation of blood, and other circumstances."⁴

"The court found that on January 25, 1917, John Rush received an accidental injury 'arising out of and in the course of

3. *Manning v. Pomerene*, 101 Nebr. 127, 162 N. W. 492, 14 N. C. C. A. 536.

4. *Gilliland v. Ash Grove and Portland Cement Co.*, 104 Kan. 771, (1919), 180 Pac. 798, 4 W. C. L. J. 187; *E. Baggot Co. v. Indus. Comm.*, (1919), 290 Ill. 530, 125 N. E. 254, 5 W. C. L. J. 202.

his employment' which caused his death on March 3, 1917. The relator admits that Rush received the injury and that it arose out of and in the course of his employment, but contends that the evidence is not sufficient to sustain the finding that his death resulted from his injury. He fell and struck upon his head and was unconscious for a few moments. Two or three days afterwards he resumed his duties and performed his work as usual for a week or more when he was discharged. During this period he appeared to be in his normal condition except that an impediment in his speech seemed to be more pronounced than theretofore. On February 19th he entered a hospital where he died on March 3rd. The doctor who made an autopsy testified that death resulted from a hemorrhage of the brain of traumatic origin, and that a microscopical examination disclosed 'repair cells' which showed that the original injury had been received several weeks previously. We are satisfied that the evidence justified the finding.'⁵

Where the evidence offered was as consistent with a finding that the cerebral hemorrhage preceded the fall and caused the fall, as it was with a finding that the fall caused the hemorrhage, the court held that the applicant had failed to discharge the burden of proving that the death was the result of an accident arising out of the employment.⁶

An employee, 59 years of age, ruptured his spinal cord while pushing a wheelbarrow over a rough street. The court held that deceased's collapse was due to the sudden giving way of a bloodvessel in his back "due to the muscular strain and exertion employed by him in propelling said wheelbarrow," and that deceased's death was due to an accident arising out of the employment.⁷

A railroad fireman fell out of an engine cab, and was found unconscious on the side of an embankment twelve feet high, and

5. State ex rel. London & L. Indemnity Co. v. District Court of Hennepin Co., 139 Minn. 409, 166 N. W. 772, 17 N. C. C. A. 790, 1 W. C. L. J. 835.

6. In re Sanderson, 224 Mass. 558, 113 N. E. 355, 14 N. C. C. A. 428.

7. State ex rel. Puhlmann v. District Ct. Brown Co., 137 Minn. 30, 162 N. W. 678, 14 N. C. C. A. 545.

died later from hemorrhage of the brain and fracture of the skull. It was contended that the hemorrhage and death was due to a syphilitic condition and consequent softening of the brain, and that the death was not proximately due to the effects of the fall. The court held that the evidence was sufficient to justify a finding that the hemorrhage was due to the accidental fall arising out of the employment.⁸

A workman suffered a hemorrhage as a result of exerting pressure against his abdomen while furrowing posts. The court held that a finding that his death was due to an accident arising out of and in the course of his employment was warranted, even though the parts on which the pressure was exerted were already diseased and weakened by cancer.⁹

A workman suffered from an attack of cerebral hemorrhage, as the result of an injury, and went home. When the effects of the first hemorrhage were about done he suffered a second hemorrhage. The court held that the burden of proving that the second hemorrhage was not due to the original injury rested upon the party alleging it, for the logical deduction was that the second was a consequence of the first, and that the workman's incapacity arose from the injury.¹⁰

An employee, who engaged in driving a team of horses attached to a scraper, was taken sick and died from internal hemorrhage, and it was claimed that while at work he was called to assist in swinging around or lifting the end of one of the dump wagons and suffered a strain which caused the hemorrhage. The court held that there was no sufficient evidence to justify a finding that the death was due to an accident, and reversed a finding awarding compensation.¹¹

8. *Peoria Railway Terminal Co. v. Indus. Bd.*, 279 Ill. 357, 116 N. E. 651, 15 N. C. C. A. 632.

9. *Voorhees v. Smith Schoonmaker Co.*, 86 N. J. L. 500, 92 Atl. 280, 7 N. C. C. A. 646.

10. *M'Innes v. Dunsmuir & Jackson Ltd.*, (1908), S. C. 1621, 45 Sc. L. R. 804, 1 B. W. C. C. 226, 7 N. C. C. A. 646.

11. *Englebreton v. Industrial Acc. Comm.*, 170 Cal. 793, 151 Pac. 421, 10 N. C. C. A. 545.

Note: See topics "Cerebral Hemorrhage" § 163 ante and "Hemorrhage" § 198 ante.

§ 335. **Hernia.**—A carpenter, engaged in fitting doors for cupboards, suffered a hernia. The court, in holding that the evidence was insufficient to justify a finding that the injury arose out of the employment, said: "A workman in order to be entitled to compensation for hernia must clearly prove: (1) That the hernia is of recent origin, (2) that its appearance was accompanied by pain, (3) that it was immediately preceded by some accidental strain suffered in the course of the employment, and (4) that it did not exist prior to the date of the alleged injury. Claimant testifies that in 1909 he had a double hernia; that he could not tell how it occurred; that he suffered no pain; that it came upon him while he was engaged in the lightest kind of work; that he lost no work as a result of it; that he was operated on and thereafter wore a truss. With this very unsatisfactory evidence before the commission, it is impossible to say that the 'recent origin' of the hernia was clearly proven. It must be noticed that there is no direct history of any accident, such as lifting or straining. It is probable that in this case the abdominal wall was weakened by more or less previous coughing. (Claimant was afflicted with tuberculosis.) It is possible that with the above weakness, the hernia came on as a result of planing. The Legislature has seen fit, in our Workmen's Compensation Act, to make hernia the subject of the special provisions and exceptions herein before set out. This court must give some effect to those exceptions. To sustain the findings and award of the commission and the district court in the instant case would be to nullify them entirely and leave claims for injury due to hernia on an identical footing with all others, if not to prefer them. In fact, if the contentions of the defendant in error be upheld, it is only necessary, in case of such a claim, to produce evidence from which a reasonable inference may be drawn that the hernia appeared 'in the course of the employment.' It is impossible for this court to so nullify these exceptions, or read them out of the statute."¹²

12. *McPhee & McGinnity Co. v. Indus. Comm. of Colo.* (1919), — Colo. —, 185 Pac. 268, 5 W. C. L. J. 160; *Matoris v. Estey Plano Co.*, (1919), 178 N. Y. S. 408, 5 W. C. L. J. 102, 189 App. Div. 297.

Where an employee felt a pain in his right side, and the following day a physician discovered a right inguinal hernia, the court held that there was no evidence to justify a finding that the hernia resulted from an accident arising out of the employment, and said: "It does not follow that, because a man had a pain in his side while doing his ordinary work, without slipping, falling, or other mishap, and a physician finds an inguinal hernia the next day, that the hernia resulted from accidental injuries, even though the physician adds to his declaration, in parenthesis the word 'traumatic.' This word, however much abused in matters relating to insurance, contemplates some external violence, some wounding or bruising of the body, and no one pretends that anything of the kind occurred in this case. The claimant himself merely says that he was doing his usual work, making no suggestion of anything happening, except that he felt a 'severe pain in the right side,' such as all persons experience, no doubt, at some time in their lives, and the next day a 'right inguinal hernia' is discovered, and this simple pain in the side is translated into an accident, within the meaning of a statute designed to protect against the extraordinary risks of certain designated employments. *Alpert v. Powers*, 181 App. Div. 802, 167 N. Y. Supp. 385. There is not even a suggestion that this hernia had not existed to the knowledge of the claimant prior to this alleged injury. It is not an uncommon thing for men with hernia to work at heavy labor and to suffer at times from exertion, and there is not a particle of testimony from which it may be legitimately inferred that this was not the case with the claimant. No connection whatever is shown between the performance of the labors of the claimant and the hernia for which this award has been made—no identity of time or of place, and nothing which brings the case within any of the provisions of the statute; and the capital of a legitimate business ought not to be taken to compensate for an alleged injury which is not shown to have been produced in connection with the services rendered by the claimant."¹³

13. *Cavallier v. Chevrolet Motor Co. of N. Y.*, (1919), 178 N. Y. Supp. 489, 5 W. C. L. J. 93, 189 App. Div. 412.

Where an employee claimed to have sustained an injury in the course of his employment resulting in a hernia, and the evidence was conflicting, the medical testimony tending to establish that the hernia was of long standing and that there were no indications of a recent injury, compensation was denied. In affirming the decision, the court said: "It is conceded plaintiff was afflicted with scrotal hernia, requiring an operation for its cure. He claimed that it was caused by an accident which he suffered while in the defendant's employ. The burden of proof rested upon him to establish the fact. If there was conflicting evidence upon that affirmance and denial, direct or circumstantial, fairly raising an issue of fact, it was for the board to decide and its decision upon that point disposes of the case."¹⁴

Where an employee claimed that while lifting a heavy timber he sustained an injury causing a hernia, but it appeared that he neither slipped nor fell while lifting the timber, nor did it strike him in any way, the court, in dismissing the case, said: "It is settled by our decisions that before an employee is entitled to recover compensation he must establish the fact that he received an accidental injury which arose out of and in the course of his employment."¹⁵

Where an employee died as the result of a hernia, and the industrial commission found that the hernia was due to an accident arising out of the employment, and an accident seemed to be the only reasonable explanation, under the circumstances, for the existence of the hernia, the court held that the finding was conclusive.¹⁶

An employee's duties were to lift, carry and throw cord wood into a furnace. He went from his home to his work on the morning of the injury in good health, and upon his return he was found to be suffering from a hernia. An operation revealed

14. *Nagy v. Solvay Process Co.*, 201 Mich. 158, 166 N. W. 1033, 17 N. C. C. A. 252, 1 W. C. L. J. 1049; *Alpert v. J. C. & W. E. Powers*, 223 N. Y. 97, 119 N. E. 229, 17 N. C. C. A. 253, 2 W. C. L. J. 106.

15. *Takles v. Bryant & Detwiler Co.*, 200 Mich. 350, 167 N. W. 36, 1 W. C. L. J. 1031.

16. *Fleming v. Robert Gair Co.*, 162 N. Y. S. 298, 14 N. C. C. A. 131, 176 App. Div. 23.

another hernia of previous origin and both were operated upon and infection resulted in both wounds causing death. It was contended that it was not known which wound became infected, but the court said that it was a reasonable conclusion that both wounds were infected during the operation and that the fatal blood poisoning would have taken place even if the injured man had only been operated upon for the injury arising from the accident. The court stated the general rule, namely; "If an accident necessitates an operation and death ensues, even though it is not a natural and probable consequence, the death may, if the chain of causation is unbroken, be said to have in fact resulted from the injury."¹⁷

A brewery assistant strained himself while lifting a cask, which strain resulted in a rupture in the same place where there had been a rupture some years previous. The county judge found that the injury was caused by an accident, within the meaning of the English Compensation Act, but that it did not arise out of the employment, but was brought about gradually as the result of the absence of support. On appeal, the court, in holding that the injury was due to an accident arising out of the employment, said: "Once you come to the conclusion that there was an accident, and that there was a rupture occasioned by the accident, I cannot see the importance of considering whether there was any unusual strain, or whether it was a strain which he was subjected to once a week, if you like for many years. At some particular time the disability which the man brings with him leads to an accident, and if you find that on the facts, I do not see how it can be said that the learned judge had any right to deal with this as he did, apparently thinking it necessary to prove there was some unusual strain."¹⁸

Where an employee suffered from chronic myocarditis prior to an operation for the relief of a hernia, which was caused by an accidental injury arising out of the employment, and he died from this disease six weeks after the operation, an award was reversed,

17. *Eddles v. School Dis. of Winnipeg* No. 1, 22 Manitoba 240, 21 W. L. R. 214, 2 W. W. R. 265, 2 Dom. L. R. 696, (1912), 14 N. C. C. A. 542.

18. *Brown v. Kemp*, 6 B. W. C. C. 725, 14 N. C. C. A. 535.

the court saying: "To establish the fact that a death resulted from an injury, it is clearly not sufficient to prove that the person received the injury; that an operation was performed on account thereof, and after he had apparently recovered from the effect of the operation and the anæsthesia, he died from a disease that existed before the injury."¹⁹

Deceased had done some heavy lifting early in the morning, and on the afternoon of the same day he was taken violently ill with strangulated hernia. The evidence, including medical testimony, was to the effect that the hernia was of very recent and accidental origin. It was held that such evidence was sufficient to sustain a finding that the injury was caused by an accident arising out of the employment.²⁰

A stoker, who was suffering from a rupture, suffered a strangulation of the hernia while engaged in his regular duties of stoking. The duties of a stoker required great abdominal strain. The court held that the subsequent death was due to the original accident arising out of the employment.²¹

§ 336. Independent Contractor Doing Extra Work.—The owner of a dredge contracted to lease his own dredge to the company and to make repairs thereto, with the services of himself or a substitute. The person who hired the dredge agreed to furnish the supplies. Upon a failure to furnish supplies the owner of the dredge found it necessary to go ashore for supplies. While cranking the engine in the motor boat, which was used to reach the shore, it backfired and broke his arm. The court held that while claimant was going ashore for supplies he was an employee of the person hiring the dredge, and the injury sustained arose

19. *Tucillo v. Ward Baking Co.*, 167 N. Y. S. 666, 15 N. C. C. A. 637, 180 App. Div. 302.

20. *Andreini v. Cudahy Packing Co. & Casualty Co. of America*, 1 Cal. Ind. Acc. Com. Dec. 8, 6 N. C. C. A. 390.

21. *Scales v. West Norfolk Farmer's Manure and Chemical Co.*, (1913), W. C. & Ins. Rep. 165, 3 N. C. C. A. 276.

Note: For further cases on this subject see § 200 ante, also see "Strains" § 247 ante. See Rupture § 349 post.

out of the employment, even though as to the operation of the dredge proper he was an independent contractor.²²

Claimant was employed by defendant in his real estate business. He received a salary of \$60.00 per month, and was to perform certain services as directed, such as collecting rents and renewing insurance policies. He was also allowed commissions on new business, provided he did not neglect his regular duties. He was also to receive commissions on sales of real estate. All negotiations for sales of real estate were to be brought to defendant's office to be closed. On the day of the injury claimant started to another city to collect the premium on an insurance policy, and to negotiate the exchange of some real estate. Neither errand was included in the duties covered by his monthly salary. While defendant knew of the real estate transaction, he did not know that it was to be closed on the day in question. In affirming the award against the contention that applicant was an "independent contractor or partner" with the defendant, the court said: "The defendant was entitled to all Trobitz's working hours and was empowered to direct his labor. In either capacity he was an employee. It is not an uncommon thing for retail merchants, for laundrymen, and the like to pay a commission to the drivers of their delivery wagons for all new business which they bring in. It has never been held that this circumstance creates a distinct relationship in law. * * * A certain amount of freedom of action was inherent in the nature of the work which the injured man performed, but this, however, did not change the character of his employment, for the employer himself still had a general supervision and control over it."²³

§ 337. **Infection From Various Causes.**—An employee sustained a contused wound on the great toe of his right foot while engaged in the service of the petitioner. He continued to work for a couple of days and then had his toe dressed by a doctor, after which he

22. *Powley v. Vivian & Co.*, 169 App. Div. 170, 154 N. Y. S. 426, 10 N. C. C. A. 835.

23. *Cameron v. Pillsbury*, 173 Cal. 83, 159 Pac. 149, 14 N. C. C. A. 496.

Note: See "Independent Contractors" § 37 ante and "Who are Employees" §§ 20 and 21.

returned to work, but on account of the pain of his toe he attempted to treat it himself. Later a streptococcic infection developed about the toe, and was transferred to the face and resulted in septicæmia, from which he died. The court held that if the employee in treating the toe himself conducted himself as would a reasonably prudent person in his situation, and thereby innocently enhanced the original injury, so that the infection was communicated to his face, and he developed erysipelas and septicæmia, causing death, a finding that the original injury continued to the end and that the death was due to the accident arising out of the employment was, in view of the evidence, justifiable.²⁴

An employee was kicked by a horse and applied salve and continued to work without consulting a doctor. Infection set in, and death resulted. The court held that it could not be said that deceased was guilty of unreasonable refusal to consult a doctor when he was not informed that the employer was furnishing the doctor. The court held further that the death was proximately due to the accident arising out of the employment and not to disease, for while conceding that persons highly appreciative of the dangers resulting from infection would at once consult a physician, "we cannot say that this is true of the great mass of mankind under the same or similar circumstances. It is a matter of common knowledge that strong, healthy men engaged in manual labor frequently give such trifling injuries, which would arouse the apprehension of others, little thought, and in comparison with the number of such injuries the instances followed by infection are not numerous. If they are treated at all, home remedies are applied, just as was done by the deceased. Carbolic salve was his remedy for cuts, bruises, etc., and this he applied. The injury itself was not sufficient to keep him from his work, and he went about the performance of his daily duties, attaching little consequence to the injury. We do not think it is customary for laboring men to rush to a doctor every time they sustain a cut, bruise, or abrasion of the skin, and we cannot say as a matter of law that the conduct

24. Bethlehem Shipbuilding Corporation, Ltd. v. Indus. Acc. Comm. of Cal., — Cal. —, (1919), 185 Pac. 179.

of the deceased was not that of the great mass of mankind under the same or similar circumstances.²⁵

An employee scratched his right hand while cleaning gears. Blood poisoning followed, resulting in his death. The court held that there was sufficient evidence to justify a finding that the infection was due to the original injury.²⁶

Decedent, while working in a blacksmith shop connected with defendant's plant, pinched his fingers and infection resulted, necessitating four operations. After the fourth operation he developed inflammatory rheumatism. The medical evidence was conflicting as to whether the rheumatism was due to the infection or a pre-existing disease. The court held that there was sufficient evidence to justify a finding that the death was due to the injury occurring in the course of the employment.²⁷

Deceased suffered an injury while setting pins in a bowling alley, and was sent to a hospital, where he was treated until practically cured. Subsequently he entered a hospital, where he died. The evidence tended to show that there was no connection between the injury and the death, and there was evidence to the effect that deceased had tried to get up and fell. The court held that on the whole there was no evidence from which a fair inference could be drawn that deceased's death was caused by the injury occurring in the course of the employment.²⁸

Deceased suffered a scratch to his hand and blood poisoning followed causing death. He had been handling bags while at work and there was evidence that when he left home for work in the morning he had no scratches upon his hand, but upon returning in the evening his hand was scratched and the testimony of fellow workers was to the effect that scratches were often received

25. *Banner Coffee Co. v. Bellig*, 170 Wis. 157, (1919), 174 N. W. 544, 5 W. C. L. J. 118; *State Indus. Comm. v. Tolhurst Mach. Works*, 184 N. Y. S. 608, 7 W. C. L. J. 136.

26. *Hege & Co. v. Tompkins*, (1919), 121 N. E. 677, (Ind. App.), 3 W. C. L. J. 451.

27. *Perdew v. Nufer Cedar Co.*, 201 Mich. 520, 167 N. W. 868, 16 N. C. C. A. 921, 2 W. C. L. J. 313.

28. *Perry v. Woodward Bowling Alley Co.*, 196 Mich. 742, 163 N. W. 52, 17 N. C. C. A. 885.

in that line of work. 'There is in evidence a copy of a letter, dated April 28, 1916, written by the Dickson Company to a representative of the casualty company in which the company carried insurance, which contains the following: 'In regard to the case of Robert I. Rackman, will advise that our Supt., Mr. Brown, interviewed all the workmen here in the plant, and found only one man that knew anything about R. I. Rackman being injured. We will forward you his signed statement as soon as he returns to work.' The trial court found that the death of deceased resulted from this scratch, and that the injury arose out of and in the course of his employment. The principal question in the case is, whether the evidence sustains this finding. The evidence is quite satisfactory that the blood poisoning and the ensuing death were the result of the scratch. The medical testimony is to that effect and the sequence of events leaves very little doubt on that point. That the scratch was received while he was engaged in his employment is not so clear. There was no direct evidence that the scratch was so received. We think, however, the evidence is sufficient. The fact that deceased had no scratch when he left home in the morning and had one when he came home from work at night, that he must have come home immediately, for he was home within half an hour of the time he quit work, that the scratch had blood upon it which had hardened, indicating that the scratch had been received earlier than the time he quit work, that it was such a scratch as he was not likely to receive on a trip from his work to his home, and such a scratch as he might well have received while at work, these facts, in connection with the letter above quoted, which is of some force as an admission, were such that the court might infer that the scratch was received while deceased was in the course of his usual work and that it arose out of it.'²⁹

An embalmer's helper died as the result of an infection alleged to have been caused by germs entering a wound on his hand. Deceased was engaged in cleaning instruments used in embalming the body of a woman who died from a virulent type of streptococcus

29. State ex rel. Dickinson v. District Court of Hennepin County, 139 Minn. 30, 165 N. W. 478, 15 N. C. C. A. 585.

infection, and it was claimed that it was in this manner that he incurred the infection. In affirming an award, the court said: "We are of the opinion that an inference favorable to the claimant can be arrived at from the evidence in the case, without indulging in any guess or speculation. Germs cannot be traced in their individual wanderings, like persons. No one ever saw a germ go from a source of infection to its victim's body. Means and sources of infection are, as a general rule based on observed conditions."³⁰

Deceased stepped upon a nail while collecting dirt in a street, and infection resulted, and death followed from tetanus. The court, in holding that the death was due to an accident arising out of the employment and not to a risk of the commonalty, said: "The commission has found that one of the duties of deceased was going about the streets, shoveling dirt into his wagon. One of the necessary incidents of driving about the streets was getting on and off his wagon. While the danger of stepping on the nail may be said to have been common to all persons using the street, an injury therefrom to a mere passer along the street, not engaged in a hazardous employment, or in the performance of an act incidental thereto, would probably not afford a right to compensation under the act. The hazardous employment of the deceased required his continued presence upon the street in the discharge of the duties of his employment. The mere fact that a person not engaged in a hazardous employment was exposed to the danger of a similar injury, should he chance to travel that way, furnishes no argument for a denial of the right of compensation to a person whose hazardous employment compelled his constant presence on the street."³¹

A domestic servant cut his index finger on the broken edge of a tray, and blood poison resulted, necessitating amputation of the finger. It was held that this was an accidental injury arising out of the employment.³²

30. *Blaess v. Dolph*, 195 Mich. 137, 161 N. W. 885, 15 N. C. C. A. 587,

31. *Putnam v. Murray*, 174 N. Y. App. Div. 720, 160 N. Y. S. 811, 15 N. C. C. A. 256; *In re Bean*, 227 Mass. 558, 116 N. E. 826.

32. *Albi v. Puth*, 37 N. J. L. J. 9.

Note: The subject of infection has also been treated under the following heads, "Infection" under the chapter on Accidents, "Friction Injuries," "Abrasions," "Eye Injuries," "Anthrax," "Bloodpoison."

§ 338. **Influenza.**—The California act (st. 1917, Subd. 4, sect. 3) defines "injury" as used in the act as including any injury or disease arising out of the employment. So where a hospital steward died of influenza contracted in the course of his employment, compensation was awarded even though an influenza epidemic was raging in the city and one out of every ten inhabitants contracted it. The medical testimony was to the effect that the danger of contracting the disease was from five to eight times greater among those exposed to it, as was the deceased, than among those not so exposed. This was held to be sufficient to justify the commission's finding that the injury arose out of the employment.³³

§ 339. **Insanity.**—An employee was injured in the course of his employment so that he was no longer able to follow his trade of boiler maker, but was capable of earning laborer's wages. He subsequently became insane. The court held that the employee was entitled to compensation for the partial disability caused by the accident arising out of the employment, saying: "We are of opinion that subsequent insanity does not deprive an employee of compensation due him under the provisions of the workmen's compensation act. Indeed the effect of subsequent insanity and the only effect of it is to make greater the employee's need to have that compensation which, apart from the subsequent disability, justice required the employer to pay him."³⁴

An employee became insane subsequent to an injury arising out of the employment, because of a syphilitic condition existing prior to the injury. It was contended that there was no causal connection between the injury and the insanity. The court held that the insanity was proximately due to the accident. See quotation from the opinion in this case, "Insanity," § 210 ante note 85.³⁵

33. *City etc. of San Francisco v. Indus. A. C. of Cal.*, — Cal. — 191 Pac. 26; *Engels Copper Mng. Co. v. Ind. Comm. of Calif.*, — Cal. —, 192 Pac. 845, 6 W. C. L. J. 624.

34. *In re Walsh*, 227 Mass. 341, 116 N. E. 496, 15 N. C. C. A. 345.

35. *In re Crowley*, 223 Mass. 288, 111 N. E. 786, 15 N. C. C. A. 345.

A motorman, as the result of a collision, received a shock, which caused insanity. It was held that the insanity was due to the accident arising out of the employment.³⁶

§ 340. **Intoxication.**—An ice wagon driver asked to be relieved from his duties because he was too drunk to finish the deliveries. Another employee was sent out, and decedent started for home. Later another employee coming from a small building on the deck said that he saw a pair of feet disappearing over the edge of the dock. Later in the day the body of decedent was taken from the river. The state industrial commission found that death was due solely to intoxication. In affirming the award, the court said: "Section 21 of the Workmen's Compensation Law (Consol. Laws, c. 67) provides that, in the absence of substantial evidence to the contrary, it shall be presumed that 'the injury did not result solely from the intoxication of the injured employe while on duty,' but in this case there was such substantial evidence. Indeed, the evidence was preponderating that the decedent was staggering drunk at the very time of the accident, and all of the known facts point to this as the proximate cause of the death."³⁷

A janitor was found at the bottom of a stairs with his skull fractured, from which he died. There was evidence that on the evening in question he was sober. It was sought to show that deceased was a habitual drunkard, and that he came to the building drunk on the evening in question. The court held that the finding of fact was within the province of the board and it would not be disturbed. Therefore a finding that the death was due to an accident arising out of the employment, was affirmed.³⁸

36. *McMahon v. Interborough Rapid Transit Co.*, 5 N. Y. S. Dep. 371. Note: see § 210 ante.

37. *Trouton v. Sheehy Ice Co.*, (1919), 187 App. Div. 818, 176 N. Y. S. 45, 4 W. C. L. J. 292; *In re Joseph Culberson*, 2nd A. R. U. S. C. C. 224; *In re Geo. W. Seegers*, 2nd A. R. U. S. C. C. 224; *In re Pope*, 163 N. Y. S. 655, B. 1 W. C. L. J. 1389.

38. *Lefens v. Indus. Comm.*, 286 Ill. 32, 121 N. E. 182, 3 W. C. L. J. 246; *Great Lakes Dredge & Dock Co. v. Totzke*, — Ind. App. —, (1919), 121 N. E. 675, 3 W. C. L. J. 448; *State v. District Court of Meeker County*, 128 Minn. 221, 150 N. W. 623; *Pierce v. Bekins Van and Storage Co.*, — Ia. —, 172 N. W. 191, 4 W. C. L. J. 78.

A hospital employee, whose duties included overseeing of several jobs, was found at the bottom of a flight of stairs with injuries which resulted in his death. It was contended that the death was not due to an accident, but to intoxication. The court on appeal, in affirming an award, said; "The finding that the deceased was not so intoxicated as to take him out of the course of his employment, and that the injury causing his death did not result directly from his intoxicated condition, must be sustained. If he had been in such a state of intoxication as to totally incapacitate him from performance of his work the injury and death might properly be said to arise out of his condition rather than his employment. Before drunkenness can be said to bar a recovery under the Workmen's Compensation Act the employee must be so intoxicated, as shown by the evidence, that the court can say, as matter of law, that the injury arose out of his drunken condition, and not out of his employment. *Frith v. Owners of Steamship Louisiana*, 2 K. B. 155; 5 B. W. C. C. 410; *O'Brian v. Star Line*, 45 Scotch L. T. 935, 1 B. W. C. C. 177. When ever an employee is so drunk and helpless that he can no longer follow his employment, he cannot be said to be engaged in his employment, and when injured while in that condition his injury does not arise out of his employment. But intoxication which does not incapacitate the employee from following his occupation is not sufficient to defeat the recovery of compensation, although, the intoxication may be a contributing cause of his injury. Our statute was not designed to make contributory negligence of the employee, or a defense of that nature, a bar to his recovery under the Workmen's Compensation Act, where, as in this case, his injury arose out of and in the course of his employment. *Alexander v. Industrial Bd.*, 281 Ill. 201, 117 N. E. 1040.⁷³⁹

Where a night watchman, when intoxicated, left his work and went to a room with intent to sleep, lighted a gas heater, closed the door and windows, and laid down on a bench, where he was asphyxiated by gas, it was held, on appeal from the award of the

39. *Hahnemann Hospital v. Indus. Bd. of Ill.*, 282 Ill. 316, 118 N. E. 767, 1 W. C. L. J. 754; *Hartford Indem. Co. v. Durham*, — Tex. Civ. App. —, (1920), 222 S. W. 275, 6 W. C. L. J. 395.

commission, that the death was not due to any accident incident to the employment or arising out of the employment. The court said: "And we may remark that the uncontradicted evidence in this case indicates, if we are to choose between the conflicting speculative deductions, that on the night in question the deceased willfully stepped aside from the performance of the duties which his employment laid upon him and invited by direct action on his part the occurrence of the detrimental causes which produced his death. In our opinion, the conclusion of the commission is not supported by sufficient evidence."⁴⁰

Where the evidence showed a conflict in the testimony as to whether or not deceased was intoxicated at the time of the injury, it was held that it was not error to fail to find that deceased was intoxicated, for such ruling was necessarily included in a finding that the accident arose out of the employment.⁴¹

"Defendants insist that the injury sustained by Nels Parson was due to his willful negligence and to intoxication. The act expressly provides that the burden of proof to establish willful negligence on the part of an injured employee is on the defendant. In the present case defendants introduced no testimony, and there is no proof of such negligence before us. Some testimony was brought out on cross-examination, showing that plaintiff's son was intoxicated to some extent when he was injured; but it is nowhere shown that his intoxication in any way contributed to his injury, and without proof we will not assume that it did."⁴²

The court, in a Massachusetts case, in passing upon the question of intoxication as a defense, said: "Where, therefore, the intoxication of the injured employee is relied on as a defense, it must be made to appear that the injury—that is to say, the accident which resulted in the injury for which compensation is sought—was

40. *Roebling Sons & Co. v. Indus. Comm.* 36 Cal. App. 10, 171 Pac. 987, 2 W. C. L. J. 38; *In re Gilbert*, 14 Ohio Law Rep. 164, 13 N. C. C. A. 497.

41. *Napoleon v. McCullough*, 89 N. J. L. 716, 99 Atl. 385, 16 N. C. C. A. 754.

42. *Parson v. Murphy*, 101 Neb. 542, 163 N. W. 847, 16 N. C. C. A. 174; *National Council of Knights and Ladies of Security v. Wilson*, 147 Ky. 296, 143 S. W. 1000; *Hartford Acc. and Indem. Co. v. Durham*, — Tex. Civ. App. —, (1920), 222 S. W. 395, 6 W. C. L. J. 275.

caused solely and exclusively by the intoxication of such employee."⁴³

Where the employee had no intention of becoming dangerously and helplessly intoxicated, he is not necessarily barred from compensation, even though the injury was proximately caused by the intoxication. It did not constitute wilful misconduct within the meaning of the Wisconsin Act.⁴⁴

It is serious and wilful misconduct for a man to be drunk at his work, under the English Act, but where death ensues, the fact that decedent was intoxicated may be disregarded when considering whether the accident arose out of the employment.⁴⁵

Where habitual intoxication so weakens the system that it is unable to withstand the effects of an accidental injury arising out of the employment, this fact does not shift the proximate cause of death from his injury to his intemperate habits. So where an employee developed delirium tremens and died following an injury, it was held that the death was due to the accident arising out of the employment.⁴⁶

Where an employee was taken to the entrance of a garage and told to go home because he was too intoxicated to work, and was later found fatally injured in an elevator shaft, his injury did not arise out of the employment.⁴⁷

§ 341. "**Ivy Poisoning**".—A section hand, who was cutting grass and removing poison ivy and other weeds from along the

43. *American Ice Co. v. Fitzhugh*, 128 Md. 382, 97 Atl. 999, 14 N. C. C. A. 291; *Collins v. Cole*, 40 R. I. 66, 99 Atl. 830, 14 N. C. C. A. 290; *In re Pope*, 163 N. Y. S. 655, 14 N. C. C. A. 293; *McIntyre v. Stewart*, (1915), W. C. & Ins. Rep. 550; *Frith v. Louisiana*, (1912), 2 K. B. 155, 9 N. C. C. A. 262, (1912), W. C. Ins. Rep. 285, 81 J. K. B. 701; *Murphy & Sandwith v. Cooney*, (1914), 2 Ir. R. 76, 9 N. C. C. A. 263, (1914), W. C. & Ins. Rep. 44, 48 Ir. L. T. R. 13; *In re Von Etta*, 223 Mass. 56, 111 N. E. 696.

44. *Nekoosa-Edwards Paper Co. v. Indus. Comm.*, 154 Wis. 105, 141 N. W. 1013, 3 N. C. C. A. 661.

45. *Williams v. Llandudno Coaching Co. Ltd.*, (1915), 2 K. B. 101, 9 N. C. C. A. 245.

46. *Ramlow v. Moon Lake Ice Co.*, 192 Mich. 505, 158 N. W. 1027, 14 N. C. C. A. 295; *Connell & Co. v. Barr*, 116 L. T. 127 (1904).

47. *Emery Motor Livery Co. v. Indus. Comm.*, — Ill. —, (1920), 126 N. E. 143, 5 W. C. L. J. 658.

right of way of an intrastate railroad, contracted ivy poisoning, resulting in blood poisoning and death. It was held that death was due to an accident arising out of the employment.⁴⁸

§ 342. **Landslides & Snowslides.**—A conductor was killed by a landslide, when he attempted to pass the slide in an endeavor to report the arrival of his train at the point where the track was blocked. It was held that the accident arose out of the employment.⁴⁹

Where an employee of a Colliery Company in a mountainous district was killed by a snowslide, which was caused by very abnormal weather conditions, it was held under the British Columbia Act that the death was due to an accident which arose out of and in the course of the employment.⁵⁰

§ 343. **Lightning.**—Deceased was employed by defendant, in Colt park, in the City of Hartford, in raking leaves. During a thunderstorm of considerable violence he took shelter under a nearby tree. While thus seeking shelter the tree was struck by lightning and he was killed. There was no protection provided for him in case of storms. The court, in holding that the death was due to an accident arising out of the employment, said: "There is a clear preponderance of scientific authority to the effect that there is a greater danger under a tree or in the open than when protected in a house. This is shown by statistics and by authoritative scientific dicta. Notice is taken of the commonly known fact that nearly all of the persons in a community such as Hartford are protected by dwelling houses, business blocks, or factories in time of a violent thunder shower, and that the injured workman was subject to a greater hazard than that experienced by the community at large. * * *

"If the place under the tree were the more dangerous, the fact that the deceased chose it as the place of refuge from the storm

48. *Plass v. Central New England R. Co.*, 169 N. Y. App. Div. 826, 155 N. Y. Supp. 854, 11 N. C. C. A. 498.

49. *Clark v. Northwestern Pacific R. R. Co.*, 1 Cal. I. A. C. (part 2) 191, 7 N. C. C. A. 429.

50. *Culshaw v. Crow's Nest Pass Coal Co.*, (1914), British Columbia Court of Appeal, 7 B. W. C. C. 1050.

and that he was injured at this place does not prevent recovery. The act of seeking and obtaining shelter arose out of, that is, was within, the scope or sphere of his employment and was a necessary adjunct and an incident to his engaging in and continuing such employment. Obtaining shelter from the violent storm was not only necessary to the preservation of the deceased's health, and perhaps his life, but was incident to the deceased's work, and was an act promoting the business of the master. L. R. A. 1916A, 348. See, also, *Richard v. Indianapolis Abattoir Co.*, 92 Conn. 277, 102 Atl. 604, where it is said that—The plaintiff 'was injured while on duty, in his working hours, when waiting for an opportunity to continue his service of employment. The accident occurred when the plaintiff was at a place where he might reasonably be. There was no turning aside upon his part, no attempt to serve ends of his own.' * * *

"A personal injury to an employee which is sustained while he is doing what he was employed to do, and as a proximate result thereof, 'arises out of and in the course of' his employment. An injury which is the natural and necessary incident of one's employment is proximately caused by such employment: as it is also when the employment carries with it a greater exposure to the injury sustained than the exposure to which persons generally in that locality are subjected."⁵¹

An employee, while operating a metal road grader, was killed by lightning during a storm. The District court, in reversing the action of the board, granted compensation on the theory that deceased's employment exposed him to a greater risk than that of the commonalty. On appeal this decision was reversed, the court saying: "The most diligent research on our part has failed to disclose any authority which supports the theory upon which this cause was decided by the court below; on the contrary, so far as they point to any conclusion respecting the subject, the authorities indicate quite clearly that the presence of the metal road grader could not have had any perceptible influence upon the lightning,

51. *Chiulla De Luca v. Board of Park Commissioners of the City of Hartford*, 94 Conn. —, (1919), 107 Atl. 611, 4 W. C. L. J. 595; *State ex rel. Peoples Coal & Ice Co., v. District Court of Ramsey Co.*, 129 Minn. 592 153 N. W. 119, 9 N. C. C. A. 129.

and did not tend to increase the natural hazard of the deceased's employment. For this reason it cannot be said from this record that his death resulted from an accident arising out of his employment, as the term is used in our workmen's compensation act.^{'52}

Where a workman on a dam was struck by lightning during a storm, the court, in denying that the nature of deceased's employment exposed him to any unusual hazard not common to the public, said: "The court below in affirming the findings of the Industrial Commission, held that the Workmen's Compensation Act 'limits compensation to those cases in which the accident grows out of the hazards of industrial enterprises and is peculiar to such enterprises,' and further held that 'an injured employee is entitled to compensation when the industry combines with the elements in producing an injury by a lightning stroke,' and further found that it could not be said that there was not a substantial basis for the finding in the evidence taken before the commission. We are inclined to agree with the learned court below in its conclusions and judgment in the case. There was testimony in this case of an expert nature for the purpose of showing that the employment of deceased at the water's edge was peculiarly dangerous from exposure to lightning. The evidence does not convince the Commission to a moral certainty that the employment was extrahazardous in this regard. It is admitted that the action of lightning is extremely freakish; and, while it is more or less controlled by general law, there are so many different elements entering into its control that we do not think the evidence in this case established that the deceased was in any position of exceptional danger because of the possibilities of lightning stroke.'^{'53}

Where a bricklayer was killed by lightning while at work on a scaffold 23 feet above the level of the ground, the court, in allow-

52. *Wiggins v. Indus. Acc. Bd.*, 54 Mont. 335, 170 Pac. 9, 1 W. C. L. J. 643, 15 N. C. C. A. 696; *Craske v. Wigan*, (1909), 100 L. T. 8, 2 B. W. C. C. 35.

53. *Hoenig v. Indus. Comm. of Wis.*, 159 Wis. 646, 150 N. W. 996, 8 N. C. C. A. 192; *Kelley v. Kerry County Council*, 42 Ir. L. T. 23, 1 B. W. C. C. 194, 8 N. C. C. A. 194; *Thier v. Widdifield*, — Mich. —, (1920), 178 N. W. 16, 6 W. C. L. J. 339.

ing compensation and holding that death was due to an accident arising out of the employment, said: "If I come to the conclusion that, as a matter of fact, the position in which the man was working was dangerous, and that in consequence of the dangerous position the accident occurred, I could fairly hold that the accident arose out of the employment. Now, was it a dangerous position? Was the man exposed to something more than the normal risk which everybody, so to speak, incurs at any time and in any place during a thunderstorm? We know that lightning is erratic, and possibly no position and circumstances can afford absolute safety. But, if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that that extra danger to which the man is exposed is something arising out of his employment."⁵⁴

Under the Utah Act, which does not require the accident to arise out of the employment, an employee, struck by lightning when he left his employment of roadwork to seek shelter, was entitled to compensation, for the injury occurred in the course of the employment, since the employee did not depart therefrom but was justified in seeking shelter from the fury of the elements.⁵⁵

Where a section hand at the direction of his foreman sought shelter in a barn during a storm, and was killed by lightning, the court held that the nature of his employment did not subject him to any greater risks than the risks of the ordinary citizenry, and held that the accident did not arise out of the employment.⁵⁶

§ 344. **Mental Shock.**—Where an employee received a personal injury arising out of the employment resulting in total disability, and it was contended that his disability was due to a mental and

54. *Andrew v. Failsworth Indus. Society Ltd.*, (1904), 2 K. B. 32, 73 L. J. K. B. 510, 90 L. T. 611, 20 T. L. R. 429, 68 J. P. 409, 52 W. R. 451, 6 W. C. C. 11, 8 N. C. C. A. 192.

55. *State Road Comm. v. Indus. Comm.*, — Utah, —. (1920), 190 Pac. 544, 6 W. C. L. J. 404; *In re Jimmie Butte*, 3rd A. R. U. S. C. C. 169.

56. *Klaviniski v. Lake Shore & M. S. Ry. Co.*, — Mich. —, 152 N. W. 213, 8 N. C. C. A. 194.

nervous condition instead of a physical breakdown, the court said: "The fact that appellee was suffering from a mental or nervous condition resulting from a physical injury, rather than from the physical injury itself, cannot have the effect of relieving appellant from liability. The court is committed to the doctrine that a 'personal injury,' as that term is used in the Workmen's Compensation Act, has reference not merely to some break in some part of the body, or some wound thereon or the like, but also to the consequence or disability that results therefrom."⁵⁷

Where an employee, while aiding in the rescue of fellow employees, many of whom were killed in an accident, became insane, due to the mental and emotional shock caused by the accident, it was held that the insanity was due to an accident arising out of the employment.⁵⁸

Where an employee fell from a scaffold injuring himself, from which he became subject to nervousness, the court held that the nervousness was due to an accident arising out of the employment.⁵⁷

An elevator operator, imagining he saw a fellow workman about to be killed, suffered a stroke of paralysis, which caused his death. It appeared that the paralysis was due to a hemorrhage of the brain which might have been caused by a diseased condition of the heart or by the mental shock arising from the excitement. It was held that such evidence was insufficient to prove that the paralysis and death was due to an accident arising out of the employment.⁵⁹

§ 345. **Misunderstood Orders.**—A woodsman misunderstood his instructions and worked at the wrong place. Upon discovering his mistake, he went to the proper place and worked so hard in preparing for the drive, which was to occur on the following day, that his feet perspired and were frozen. On appeal the court, in holding that the freezing of his feet was due to an accident arising out of the employment, said: "On the day in question

57. *Kingan & Co., Ltd. v. Issam*, (Ind. App.), 121 N. T. 289, 3 W. C. L. J. 276.

58. *Indus. Acc. Comm. in Reich v. City of Imperial*, 1 Cal. Ind. Acc. Comm. Dec., (1914), 337, 10 N. C. C. A. 479.

58. *Keck v. Morehouse*, 2 Cal. I. A. C. 311.

59. *Coslett v. Shoemaker*, 38 N. J. L. J. 116, 10 N. C. C. A. 1046.

See § 218 ante.

by reason of the mistake, the defendant Beaulieu worked harder than he ordinarily did, as a result of which his feet became wet from perspiration, a circumstance which made them more susceptible to cold, and as a consequence thereof his feet were frozen. It seems clear that the hazard to which the defendant Beaulieu was exposed was one which was incident to and can be fairly traced to his employment as a contributing cause, and that he would not have been equally exposed to such a hazard apart from his employment. If the defendant Beaulieu while engaged in his work had wet his feet by stepping into an open spring and the freezing had resulted therefrom, it could scarcely be claimed that the injury was not proximately caused by accident. In this case the condition of his feet was due to extra exertion caused by reason of a misunderstanding as to orders. Because there would be no logs for hauling in the morning, he was required to put forth an unusual and extra effort, which made him more susceptible to cold than he otherwise would have been. It is clear that the exposure of the defendant Beaulieu to injury by freezing was substantially increased by reason of the nature of the services which he was obliged to render. We think it must be held that the injury for which compensation was awarded was proximately caused by accident within the meaning of the act.⁶¹

Claimant sustained a burn in the course of and arising out of the employment. He visited a doctor, and on the day of his last visit, his burned hand showed signs of improvement, and he did not return for further treatment until the finger had nearly rotted off. The physician testified that he told claimant to return for further treatment and claimant testified that he was told not to return. The court held that, in view of the fact that claimant was a foreigner and did not understand the English language to any extent, he was not guilty of such wilful misconduct as would preclude a recovery.⁶²

An oiler was told not to allow oil to drop on a pulley of a particular machine, and not to put so much oil on the machine;

61. *Ellingson Lbr. Co. v. Indus. Comm. of Wis.*, 168 Wis. 227, 169 N. W. 568, 3 W. C. L. J. 215, 17 N. C. C. A. 1003.

62. *Oniji v. Studebaker Corporation*, 196 Mich. 397, 163 N. W. 23, 15 N. C. C. A. 76; *Poniatowski v. Stickley Bros. Co.*, 194 Mich. 294, 160 N. W. 569, 15 N. C. C. A. 77.

but the oiler through a misunderstanding or otherwise, hung a pail to catch the dripping oil and was injured while removing the pail. It was held that the injury arose out of the employment.⁶³

Where a deaf employee misunderstood orders as to where his work was to be performed and went to a different place with the approval of his fellow workmen, an injury, sustained there while doing the exact work he had been instructed to do, arose out of his employment.⁶⁴

§ 346. **Neurosis.**—That the workman, but for the want of sufficient will power, could have thrown off the condition of hysterical blindness and neurosis caused by the injury, did not deprive him of his right to compensation.⁶⁵

Where a workman receives a blow on the head, causing no apparent serious injury, but inducing him to sincerely believe that he is incurably injured, which belief incapacitates him, the incapacity is an injury for which compensation will be allowed.⁶⁶

Where a workman, after the effects of the injury are all gone, still suffers from traumatic neurosis, he is entitled to compensation until the traumatic neurosis ceases to incapacitate him.⁶⁷

Where a workman, after his injuries have healed, complains of pain, loses weight and gradually becomes an invalid, due to traumatic neurosis, although there is no physical basis for such condition, it is held that he is entitled to compensation.⁶⁸

Where disability of a workman was due largely to imagination and a slight neurotic condition, which would best be cured by claimants return to work, the court made an award of six weeks compensation in addition to the twenty-six weeks that had already been paid by the employer.⁶⁹

63. *Panacona v. Vulcanite Portland Cement Co.*, 37 N. J. L. J. 75.

64. *In re Greeney*, — App. Div. —, (1920), 180 N. Y. S. 648, 5 W. C. L. J. 723.

65. *In re Hunnewell*, 220 Mass. 351, 107 N. E. 934.

66. *Rollnik v. Lankershim*, 1 Cal. I. A. C. 45.

67. *Manfredi v. Union Sugar Co.*, 2 Cal. I. A. C. 20.

68. *Hakala v. Jacobsen-Bade Co.*, 1 Cal. I. A. C. 328; *Kelly v. Pac. Electric Ry. Co.*, 1 Cal. I. A. C. 150.

69. *Intorigne v. Smith & Cooley*, 1 Conn. Comp. 228; *Pendo v. Mammoth Copper Mining Co.*, 1 Cal. I. A. C. 80.

A cigar maker, by reason of his occupation, received a personal injury due to the unusual degree of strain on certain muscles in his arm, and also to the rapidity with which he used them, which caused a condition of neurosis incapacitating him for labor. The commission held that the incapacity was the result of an accidental injury.⁷⁰

Where an injury caused the loss of will power, due to traumatic neurosis, whereby claimant was unable to work, the court found that he was entitled to compensation for such disability.⁷¹

§ 347. **Paralysis.**—An employee sustained a blow on the neck from a shovel. A state of paralysis followed. The Commission arrived at the following conclusion, and their award was affirmed by the higher court, which quoted from their decision as follows: 'In view of the extreme hot weather, age of the applicant, and the obvious susceptibility of applicant to suffer a paralytic stroke at the time of the accident, the fact that no evidence of sickness or distress was apparent immediately before the blow, that a strange feeling, sickness, and a paralytic stroke developed in usual time immediately following the blow, it is reasonable to conclude that the blow from the shovel, received accidentally and arising out of and in the course of his employment by the defendant corporation, was the proximate cause of the disability suffered by applicant, and an award of compensation should be made accordingly.'⁷²

It was held that where an employee's duties exposed him to unusual risk from the sun's heat and he suffered a sunstroke' which caused paralysis of the brain and death, that the paralysis and death was due to an accident arising out of the employment.⁷³

70. *Lee v. Employers Liability Assur. Corp.*, 2 Mass. Work. Comp. Cases, 753.

71. *Smith v. Smith (Globe Indemnity Co.)*, 2 Conn. Workm. Comp. Com. 628.

Note: See "Mental Shock," § 344, also "Insanity" § 339.

72. *Murray City v. Indus. Comm. of Utah*, (Utah), (1919), 183 Pac. Rep. 331, 4 W. C. L. J. 647.

73. *Ahern v. Spier*, 93 Conn. 151, 105 Atl. 340, 3 W. C. L. J. 221.

Where an employee was awarded compensation for paralysis following heavy lifting, but it appeared that the board based its finding on a previous fall received by the employee, the court on appeal reversed the decision on the ground that there was no showing that the fall was received in the course of the employment.⁷⁴

A candy packer, whose duties necessitated that she work in a cool room, suffered from facial paralysis, which began while she was at work. It was held that the injury was received in, and arose out of the employee's employment.⁷⁵

Where an employee sought to reach his place of employment by a very dangerous means of ingress, instead of using the safe way provided by the employer, and fell, sustaining injuries to his back and paralysis, the court held that he was not acting within the scope of his employment and that his injury did not arise out of the employment.⁷⁶

A fireman, while attempting to move heavy iron beams, became faint and weak, complaining of pains in his stomach, and a few days later suffered a paralytic stroke. It was held that the paralytic stroke was due to an accidental injury arising out of the employment.⁷⁷

An employee who had previously suffered a stroke of paralysis and recovered therefrom, was later found drowned in a vat on his employer's premises, and all the evidence tended to show that his fall into the vat was due to dizziness. It was held that the accident arose out of the employment.⁷⁸

§ 348. **Pneumonia.**—A driver on a lumber sleigh suffered an injury while lifting the end of the sleigh. Later he developed

74. *David-Bradley Mfg. Co. v. Ind. Bd. of Ill.*, 283 Ill. 468, 110 N. E. 615, 2 W. C. L. J. 226, 17 N. C. C. A. 250.

75. *Dalton v. Employer's Liab. Assur. Corp. Ltd.*, 2 Mass. W. C. C. 231, 12 N. C. C. A. 327.

76. *In re Babcock*, Ohio Ind. Comm., (1919), 12 N. C. C. A. 655.

77. *Manning v. Pomerene*, 101 Neb. 127, 162 N. W. 492.

78. *Harmon v. Gen. Acc. Assur. Corp.*, 3 Mass. Indus. Acc. Bd. 166, 12 N. C. C. A. 80.

Note: See § 232 ante.

lobar pneumonia, and traumatic gangrene of the lungs, from which he died. The evidence was conflicting as to whether the disease was due to the injury. The court held that there was sufficient evidence to justify a finding that the injury produced an impaired physical condition resulting in disease and death, and that the death was attributable to the injury arising out of the employment.⁷⁹

A night watchman went to work as usual. The following morning he was discovered in a state of collapse. He developed pneumonia and peritonitis, and after a few days died. It was alleged that the disease was due to an injury arising out of and in the course of the employment. In affirming an award the court said: "The defendants deny that the illness and death of Mailman was due to an injury, accidental or otherwise. They argue that when he began work on the evening of April 18th he was 'coming down' with pneumonia. This is disputed. If true, it is not decisive. Evidence that an existing disorder reaches the point of disablement during employment, of course, does not prove accidental or other injury arising out of such employment. It is sufficient however (assuming other elements proved), if by weakening resistance or otherwise an accident so influences the progress of an existing disease as to cause death or disablement *Voorhees v. Smith* 86 N. J. Law, 500, 92 Atl. 280; *Trodden v. McLennard*, 4 B. W. C. C. 190; *Doughten v. Hickman*, 6 B. W. C. C. 77; *Puritan v. Wolfe* (Ind. App.) 120 N. E. 417. 'There is some evidence that upon the body of the deceased a mark, or marks, were observed which turned black when blood poisoning set in. There is some medical testimony to the effect that the symptoms were more consistent with traumatic pneumonia than with illness otherwise caused. The spontaneous exclamation of the suffering man, 'I got hurt,' clearly admissible for this purpose, shows that what he sensed and felt was the shock of a hurt rather than the prostration of illness. In view of these circumstances, it cannot be reasonably said that there was no evidence that the illness of the deceased

79. *Folts v. Robertson*, (1919), 188 App. Div. 359, 177 N. Y. S. 34, 4 W. C. L. J. 429; *Tanner v. Aluminum Castings Co.*, — Mich. —, (1920), 178 N. W. 69, 6 W. C. L. J. 337.

was traumatic. There being no evidence, suggestion, or presumption that any injury sustained by the deceased was occasioned by his willful intention, or that it resulted from his intoxication while on duty, we think it is an almost necessary inference that, if he were injured, the injury was accidental. The accident must have arisen out of and in the course of the employment. In other words, it must have been due to a risk to which the deceased was exposed while employed, and because employed by the defendant. There is evidence that Mailman on the night of the 18th was in good health. He was left performing his duties at the foundry 'laughing and joshing.' The following morning he was found, still at his post of duty, stricken and helpless. The deceased might have left the foundry in the night in pursuit of his own affairs, received an injury, and found his way back. He might have been injured in the foundry while doing something for his own personal pleasure, entirely independent of his employment. These unsupported hypotheses are so improbable as to be almost negligible. From all the circumstances, the commissioner drew the inference that Mailman's injury was received while at the defendant's foundry and arose out of such employment. This inference is neither unnatural nor irrational."⁸⁰

A sheet metal worker received an injury to his ankle and was operated on in a hospital. After leaving the hospital he went for an automobile ride with a friend. The following day he died from general sepsis one of the main factors causing the conditions of hypostatic pneumonia. "It is insisted by plaintiff in error that the injury to the foot had no connection with the death; that the conditions which caused the death were the direct result of the exposure from the automobile ride. Shaw wore no overcoat during the ride. He had on flannel underwear, his limb was wrapped in flannel, and he was wrapped to the armpits in a heavy lap robe. Several physicians testified, most of them as experts. Their testimony is too voluminous and technical to set out in this opinion. They did not all agree, and the opinions expressed by some of them tend to support the contention of plaintiff in error. Others

80. *Mailman v. Record Foundry & Machine Co.*, 118 Maine 172, (1919), 106 Atl. 606, 4 W. C. L. J. 205.

expressed the opinion that death resulted from the continued septic process, and that the ride in the automobile had nothing to do with it. We cannot weigh the evidence. If there is any competent testimony fairly tending to support the claim of defendant in error, we cannot consider the weight of the evidence, and reverse the judgment because in our opinion it is contrary to the preponderance of the testimony. *Munn v. Industrial Board*, 274 Ill. 70, 113 N. E. 110; *Bloomington Decatur & Champaign Railroad Co. v. Industrial Board*, 276 Ill. 454, 114 N. E. 939; *Schwarm v. Thompson & Sons Co.*, 281 Ill. 486, 118 N. E. 95. There was competent testimony to support the claim of defendant in error that the death resulted from an accident arising out of and in the course of the employment.⁸¹

Where a piano mover strained himself while moving a piano, and later died from abscess and pneumonia resulting from the abscess, the court held that the medical testimony was sufficient to justify a finding that the death was due to the accident arising out of the employment, and not due to disease.⁸²

Where an employer, who was engaged at work in a carpenter shop where there was a circular saw, was struck in the chest by a flying board and later died from pneumonia, which the testimony of physicians showed was directly caused by the accidental injury received in the course of the employment, the master was held liable, although it was not positively shown from what source the flying object came.⁸³

A driver fell from his wagon and injured his head, resulting in loss of memory. Subsequent to the passing of the Workmen's Compensation Act he suffered so much from this malady that he lost his way in a swamp while driving back to the stables, and remained all night in the swamp. As a result of the exposure he

81. *Gergstrom v. Indus. Comm.*, 286 Ill. 29, 121 N. E. 195, 3 W. C. L. J. 232; *Ft. Wayne Rolling Mill Corp. v. Buanno*, (Ind App.), (1919), 122 N. E. 362, 3 W. C. L. J. 626.

82. *Wolford v. Geisel Moving & Storage Co.*, 262 Pa. 454, (1919), 105 Atl. 831, 3 W. C. L. J. 798; *Bayne v. Riverside Storage Co.*, 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837.

83. *Hanna v. Michigan Steel Castings Co.*, 204 Mich. 139, 170 N. W. 6, 3 W. C. L. J. 322.

developed pneumonia and died. It was held that his death was not due to an injury arising out of the employment, the court saying: "If the horse driven by Milliken had run away and Milliken had been thereby thrown out and killed the personal injury in fact suffered in that case would have been one which from the nature of his employment would be likely to arise and so would be one 'arising out of his employment.' But as we have said, there is nothing in the employment of driving a wagon which makes it likely that the employee will alight from his wagon, wander to and fall into a swamp, and lie there all night. It seems plain that if Milliken's death was caused by a personal injury, it was the one which happened some four or five years before the occurrence here complained of and before the Workmen's Compensation Act was passed. At that time he fell from his wagon and striking on his head suffered as a result 'an impairment of his memory.' "84

Where a city fireman contracted pneumonia as the result of a wetting received while fighting a fire, it was held that he did not die as the result of an "accident" arising out of his employment, as this was one of the natural incidents of his employment.⁸⁵

§ 349. **Ruptures.**—Where an employee sustained a rupture as the result of a strain, caused by an attempt to hold castings on a truck when the truck dropped into a hole, it was held that the rupture was due to the accident arising out of and in the course of the employment.⁸⁶

Where an employee sustained a rupture necessitating an operation, and later died from tuberculosis, the testimony as to the origin of the tuberculosis was conflicting, and the court held that the onus of

84. *Milliken v. A. Towle & Co.*, 103 N. E. 898, 216 Mass. 293, 4 N. C. C. A. 512, L. R. A. 1916A, 337.

85. *Landers v. Muskegon*, 196 Mich. 751, 163 N. W. 43; *Linnane v. Aetna Brewing Co.*, 91 Conn. 158, 99 Atl. 507.

Note: See *Hernia* § 200 ante.

86. *Schanning v. Standard Castings Co.*, 203 Mich. 612, 169 N. W. 879, 3 W. C. L. J. 331.

proving that there was any causal connection between the accident and the death had not been discharged.⁸⁷

Where an employee claimed that he sustained a rupture as the result of a strain from overexertion in lifting bundles of paper, and the evidence showed that no strain occurred, it will not be presumed that the rupture was due to an accident arising out of the employment.⁸⁸

The rupturing of a bloodvessel, as the result of a strain in heavy lifting, which caused death, is an injury arising out of the employment.⁸⁹

Under the Minnesota Workmen's Compensation Act, death caused by the rupture of a bloodvessel resulting from muscular strain and exertion while working, was held to be an accident arising out of and in the course of the employment.⁹⁰

"A rupture caused by a strain while at work is an accident or untoward event, arising in the course of employment, and compensable under the Workmen's Compensation Act. Proof of apparent previous good health, a heavy and unusual lift in the course of work, discovery of rupture on the second day thereafter, death from surgical operation for relief thereof, and opinion of the operating surgeon that the rupture was caused by the lifting, is sufficient to establish accidental injury in the course of employment, within the meaning of said act."⁹¹

Where an employee suffered a rupture in the course of his employment, and the employer's report to the insurance company

87. *Kemp v. Clyde Shipping Co., Ltd.*, 119 L. T. R. 131, (1918), 11 N. C. C. A. 875.

88. *Alpert v. J. C. & W. E. Powers*, 223 N. Y. 97, 119 N. E. 229, 2 W. C. L. J. 106, 17 N. C. C. A. 248.

89. *Greenburg v. Leather Goods Co.*, (1916), 3 Cal. I. A. C. 328.

90. *State v. District Court*, 137 Minn. 30, 162 N. W. 678; *LaVeck v. Parke Davis Co.*, 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D, 1277; *Southwestern Surety Ins. Co. v. Owens*, (Tex. Civ. App.), 198 S. W. 662, 1 W. C. L. J. 271; *Bystrom v. Jacobson*, 162 Wis. 180, 155 N. W. 919; *Hughes v. Clover Clayton*, 3 B. W. C. C. 175; *Mathlessen-Hegeler Zinc Co. v. Indus. Bd.*, 284 Ill. 378, 120 N. E. 249; *Peoria Railroad Terminal v. Indus. Bd.*, 279 Ill. 352, 116 N. E. 651.

91. *Poccardi v. Public Serv. Comm.*, 75 W. Va. 542, 84 S. E. 242, 8 N. C. C. A. 1065.

stated that the employee was injured as the result of the elevator operator losing control and the dropping of the cage in consequence, is sufficient evidence to make out a *primæ facie* case, and will sustain a finding that the injury arose out of the employment.⁹²

§ 350. **School Teacher Injured or Killed.**—The duties of the principal of a high school included the selection of a team each year for the purpose of playing basket ball. While so doing he was struck by a basket ball, sustaining injuries from which he died. It was held that his death was due to an injury arising out of the employment.⁹³

“A school district employed a young woman teacher for a one-room school in a densely wooded and sparsely settled part of the country. On her way to her boarding house, after her day’s work at the schoolhouse was done, and when off the school house grounds, she was assaulted by an unknown man for the gratification of his passions, and as a part of the transaction she was shot and the sight of one eye was destroyed. The Workmen’s Compensation Act. (Gen. St. Minn. 1913, Section 8195 et seq.) gives compensation for personal injury “caused by accident, arising out of and in the course of employment.” It does not cover workmen, except while engaged in or about the premises where their work is done or their service requires their presence; and it excludes “an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of his employment.” Without determining whether the injuries to the teacher arose in the course of the employment, it is held that they were not caused by accident arising out of the employment and that they are not compensable under the Compensation Act.”⁹⁴

92. *Egger’s Veneer Seating Co. v. Indus. Comm. of Wis.*, (1919), 170 N. W. 280, 168 Wis. 377, 3 W. C. L. J. 396.

Note: For further cases on rupture, see “Strains,” “Bloodvessel Ruptured,” “Aneurisms” and “Artery Ruptures.”

93. *City of Milwaukee v. Indus. Comm.*, 160 Wis. 238, 151 N. W. 247.

94. *State ex rel. Common School District No. 1 in Itasca County v. District Court of Itasca County*, 140 Minn. 470, 168 N. W. 555, 17 N. C. C. A. 937, 2 W. C. L. J. 661.

A school teacher, in order to open a bookcase to obtain needed books, attempted to move a row of desks weighing 458 pounds, which had been placed in front of the case on the previous Friday night to make room for a dancing party, and as a result of the attempt she injured her back. It was held that she had sustained an injury arising out of the employment regardless of the fact that the duty of replacing the seats devolved upon the janitor.⁹⁵

A school teacher tripped and fell and sustained injuries while going to a telephone on business of her own after school, but while she was still at the schoolhouse finishing her work. It was held that she had suffered an accidental injury arising out of her employment, for the course of employment is not restricted to acts solely for the master's benefit, but includes all acts which an employee may reasonably do while at work.⁹⁶

Where the evidence showed that a school teacher's previous health was very poor, and the evidence of the schoolroom being poorly heated was contradicted, it was held that it could not be said that her death from pneumonia had any causal connection with the employment⁹⁷

§ 351. **Self Inflicted Injuries.**—An employee of a logging crew was killed by dynamite which was used in blowing out stumps. The accident occurred while everybody, except deceased, was at dinner. It was contended that the applicant had not shown that the accident arose out of the employment and was not a case of self-inflicted injury. The commission found that the death was due to an accident arising out of the employment. On appeal the court said: "The appellant contends that the facts in the record before the commission were not such as to warrant the inference arrived at by the commission that Perry's death occurred while he was in the performance of his duty and in the master's employment, and that such conclusion must have been based upon mere

95. *Elk Grove Union High School District v Indus. Acc. Comm. of Cal.*, 34, Cal. App. 589, 168 Pac. 392, 15 N. C. C. A. 148, 1 W. C. L. J. 143.

96. *Reiff v. City of Sacramento*, 2 Cal. I. A. C. 251, (1915), 12 N. C. C. A. 901.

97. *Arnold v. Town of Brooklyn*, 1 Conn. Comp. Dec. 188.

conjecture, and that therefore the claimant had not met the burden of proof imposed upon her under the law. It is also contended that there was no evidence showing that there was any reason for blowing up the tree near which Perry was found dead, or that there was any further work of blasting required for the stump, already partly blasted, which was near where his body was found, and that there was no foundation for the suggestion by the commission in their finding that Perry remained at the place after the crew went to dinner in order to clear away the tree or stumps, and that therefore there was a total absence of evidence upon which might be predicated a finding that Perry met his death while within the scope of his employment. It is undoubtedly the rule of law in this state that findings of the Industrial Commission must be supported by evidence and not based upon mere conjecture. *Voelz v. Industrial Com.*, 161 Wis. 240, 152 N. W. 830. The situation here was one clearly requiring the commission to apply the well-recognized presumption against suicide in such cases of accidental death. *Mil. W. F. Co. v. Industrial Com.*, 159 Wis. 635, 150 N. W. 998. With that presumption, therefore, and the facts disclosed in the testimony of Perry's employment as foreman in charge of the construction of this road, the partially exploded stump left in the road, or even the sapling near which he was found, upon either of which Perry might have been contemplating the use of dynamite, even though such use might not have been in accordance with the customary or economical way of constructing such a road, all presented a situation from which the conclusion might have been reasonably and properly drawn that whatever Perry was then doing was within what he then thought was his duty rather than the conclusion that it was an intentionally self-inflicted injury. Within the broad field intended to be covered by our Compensation Act we think the conclusion arrived at by the commission was within their discretion."⁹⁸

"There can be no presumption that a man recklessly imperils his own life." So where an officer returned to a vessel from his life boat, after the ship had drifted onto the rocks and had been

98. *Bekkedal Lumber Co. v. Indus. Comm. of Wis.*, 168 Wis. 230, 169, N. W. 561, 3 W. C. L. J. 212, 17 N. C. C. A. 247.

abandoned, thereby losing his life, it was held that there was no presumption that he intended to sacrifice himself.⁹⁹

Where a boy fifteen years of age was killed as the result of an attempt to play a practical joke upon a fellow employee, the injury cannot be said to have been purposely self-inflicted so as to defeat a claim for compensation.¹

§ 352. **Suicide.**—An employee who was engaged in removing ashes from a pit under a large steel burner, died from the effects of ashes which had been taken into his stomach. "There is no evidence tending to show that on the night in question plaintiff's decedent had with him a pail of water into which large quantities of ashes might have fallen in the course of the work. There is no evidence that decedent drank from a pail of water heavily impregnated with ashes. There is evidence of the physician to the effect that the liquid taken from the man's stomach would be 'a little burning;' that 'it would burn and taste nasty;' and that. 'To swallow something that hasn't a pleasant taste involves an effort of the will.' Counsel for claimant assert that the foregoing facts are sufficient to support the inference indulged in by the board to the effect that decedent swallowed the ashes and alkaline liquid accidentally. They point out that, it being undisputed the lye and ashes were in the stomach and caused the death, the only possible inferences are: (1) That they were taken into the stomach by the decedent accidentally; or (2) that they were so taken willfully and with suicidal intent—and they rest upon the presumption against suicide, citing *Wisheless v. Hammond*, 201 Mich. 193, 166 N. W., 993. This position is met by counsel for appellant with the argument that the presumption arises only where the facts and the logical deductions therefrom point with equal cogency to suicide or accidental death, and that in the case at bar the accidental theory is negatived by the testimony of the doctor that the substance found in the stomach of

99. *North Pac. S. S. Co. v. Indus. Comm. of Cal.*, 174 Cal. 346, 163 Pac. 910, 14 N. C. C. A. 425.

1. *Twin Peaks Canning Co. v. Indus. Comm.*, — Utah —, (1921), 196 Pac. 853.

the decedent could not have been taken by decedent without a conscious effort because of its unpleasant taste. The rule to be adopted by the board is set out clearly in the case of *Ginsburg v. Adding Machine Co.*, 204 Mich. 130, 170 N. W. 15, in the following language: 'It is the province of the board to draw the legitimate inference from the established facts and to weigh the probabilities from such established facts. *Wilson v. Phoenix Furniture Co.*, 201 Mich. 531, 167 N. W. 839. But the inferences drawn must be from established facts; inference may not be built upon inference, possibilities upon possibilities, or inferences drawn contrary to the established facts, contrary to the undisputed evidence. If an inference favorable to the appellant can only be arrived at by conjecture or speculation, the applicant may not recover. So if there are two or more inferences equally consistent with the facts, arising out of the established facts, the applicant must fail'—citing many cases. Applying that rule to the facts in the case at bar, and in further consideration of the rule which places the burden of establishing the claim for compensation on those seeking the award, we are constrained to the view that the inference that the liquid and ashes found in decedent's stomach and which caused his death were taken into the system by the decedent with suicidal intent is at least as reasonable as that they found entrance to the stomach accidentally, and where two inferences equally consistent with the facts arise out of established facts, one involving liability on the part of the employer under the act, and the other relieving him from liability, the applicant must fail. The award must be vacated.'" In this case there was a dissenting opinion concurred in by three of the seven judges and based principally upon the authority of the case mentioned in the following paragraph.²

An elevator operator disappeared, and three days later his body was found in the bottom of an elevator shaft. There was evidence that deceased was intoxicated early in the morning on the day of the accident, that his domestic relations had not been

2. *Chaudier v. Stearns & Culver Lbr. Co.*, 206 Mich. 433, (1919), 4 W. C. L. J. 508, 173 N. W. 198; *Rourke v. Holt & Co.* (1918) W. C. & Ins. Rep. 7, 51 Ir. L. T. 121.

happy, and that the mechanical superintendent had reprimanded him for inattentiveness to his duties. The court held that where the death occurred under circumstances which would suggest either suicide or accident the presumption is against suicide and in favor of an accident.³

A miner was found dead, following an explosion. No one saw the accident, and there was no occasion for the use of explosives at that time. There was evidence tending to show circumstances equally consistent with a finding of suicide as with that of accident. The court said: "Other facts and circumstances are mentioned in the testimony, most of them unimportant and none or all of them conclusive of either theory. If death is not the result of suicide, the employer must respond. The evidence may be too meager to establish affirmatively either accident or suicide, but when violent death is shown, the presumption arises that it was not self-inflicted. 'As between accident and suicide the law for logical, and sensible reasons supposes accident,' until the contrary is shown. * * * The evidence is surely not conclusive of suicide. We conclude that the determination of the trial court that death was accidental is sustained."⁴

§ 353. **Testing Racing Motorcycle.**—Where an employee of a firm dealing in racing motorcycles sustained serious injuries while testing the speed of a motorcycle at the direction of his employer, it was held that the crashing of the motorcycle through

3. *Wishcaless v. Hammond, Standish & Co.*, 201 Mich. 192, 166 N. W. 993, 1 W. C. L. J. 1055, 17 N. C. C. A. 792; *Bekkedal Lbr. Co. v. Indus. Com. of Wis.*, 168 Wis. 230 169 N. W. 561, 3 W. C. L. J. 212, 17 N. C. C. A. 247.

4. *State ex rel. Oliver Iron Mining Co. v. District Court of St. Louis County*, 138 Minn. 138, 164 N. W. 582, 15 N. C. C. A. 526; *Milwaukee Western Fuel Co. v. Indus. Comm.*, 159 Wis. 635, 150 N. W. 998; *Sorensen v. Menasha Paper Co.*, 56 Wis. 342, 14 N. W. 446; *W. R. Rideout Co. v. Pillsbury*, 173 Cal. 132, 159 Pac. 435, 12 N. C. C. A. 1032.

Note: See "Suicide" § 248 ante, also "Death, Presumption From While at Work," § 167 ante. "Insanity" §§ 210 and 339 ante, see also "Self-Inflicted Injuries" § 351 ante.

a fence while going at the rate of sixty two miles per hour was an accident arising out of the employment.⁵

An employee, whose duties as a solicitor required constant use of a motorecycle, which was furnished by his employer, was injured while trying out a motorecycle at the place of business of a dealer where his employer contemplated purchasing another motorecycle. It was held that, in assuming to act without any authority in this regard, the employee was acting outside the scope of his employment, and therefore his injury did not arise out of the employment.⁶

§ 354. **Tetanus.**—A driver for a florist undertook to assist in the adjustment of a window box for a customer, and in doing so he fell from a ladder, causing a compound fracture of the thumb which resulted in tetanus and death. The court of appeals, in reversing a judgment, held that the accident did not arise out of the employment, for there was no causal connection between deceased's employment and the accident, for his duties did not include the adjusting of window boxes for customers.⁷

A boy, sixteen years of age, was employed by the defendant to take up a floor. The work was finished in the forenoon, and in the afternoon, while decedent and other boys were looking for money in the dirt beneath the floor, he ran a nail into his foot causing tetanus and death. It was held that the death did not result from an accident arising out of the employment.⁸ Where death resulted from a similar injury received while the employee was at work, compensation was awarded.⁹

An employee, whose duties included gathering dirt from the street, stepped on a rusty nail as he was getting into his wagon, and the wound became poisoned and death resulted from tetanus. The court in affirming an award for accidental death arising out of the employment, said: "The commission has found that one of

5. *Lawson v. Stockton Motor Cycle and Supply Co.*, 2 Cal. I. A. C. 628.

6. *Phillips v. Pacific Gas & Elect. Co.*, 2 Cal. I. A. C. 788.

7. *Glatzl v. Stumpp*, 220 N. Y. 71, 114 N. E. 1053, 16 N. C. C. A. 645, rev'g 174 N. Y. App. Div. 901, 159 N. Y. S. 1115.

8. *Davis v. Mals, Indiana Indus. Bd.*, (1915), 11 N. C. C. A. 506.

9. *Snyder et al. v. Indus. Comm.*, — Ill. —, 130 N. E. 517, (1921).

the duties of deceased, was going about the streets, shoveling dirt into his wagon. One of the necessary incidents of driving about the streets was getting on and off his wagon. While the danger of stepping on the nail may be said to have been common to all persons using the street, an injury therefrom to a mere passer along the street, not engaged in a hazardous employment, or in performance of an act incidental thereto, would probably not afford a right to compensation under the act. The hazardous employment of the deceased required his continual presence upon the street in the discharge of the duties of his employment. The mere fact that a person not engaged in a hazardous employment was exposed to the danger of a similar injury, should he chance to travel that way, furnishes no argument for a denial of the right of compensation to a person whose hazardous employment compelled his constant presence on the street.'¹⁰

§ 355. **Toxic Amblyopia.**—A photographer suffered from toxic amblyopia, which was due to some poison taken into the body. He had been slightly burned about the head and face by an explosion in the course of his employment, but his eyes were not injured thereby. It was held that there was no evidence to show that his condition was due to any accidental injury arising out of the employment.¹¹

§ 356. **Tuberculosis.**—An employee suffered an injury in the course of and arising out of the employment, which was of such a serious nature as to greatly impoverish his system and predispose it to an infection of tuberculosis, of which there was not the slightest indication before the injury. The court, in holding that the death was due to the accident arising out of the employment, said: "Where a workman receives personal injury from an accident arising out of and in the course of his employment, and disease ensues which incapacitates him for work, the incapacity may

10. Putnam v. Murray, 174 N. Y. App. Div. 720, 160 N. Y. S. 811, 15 N. C. C. A. 256.

Note: See § 252 ante.

11. Diehels v. Lasky's, (1916), 3 Cal. I. A. C. 351.

be the result of the injury, within the meaning of the (English) Workmen's Compensation Act, even though it is not the natural result of the injury. The question to be determined on a claim for compensation is whether the incapacity is in fact the result of the injury. *Ystradowen Colliery Co. v. Griffiths*, (1909), 2 K. B. 533. In a case where a petitioner's arm was broken while he was in defendant's employ, and the fracture properly united, but there developed an abscess upon the fleshy part of the thumb, which resulted in ankylosis, making the thumb useless, our Supreme Court held that the ankylosis of the thumb was an injury arising by accident out of and in the course of the employment. *Newcomb v. Albertson*, 85 N. J. Law, 435, 89 Atl. 928. And Mr. Justice Swayze, in writing the opinion in *Liondale Bleach Works v. Riker*, 85 N. J. Law, 426, at page 429, 89 Atl. 929, observed that the question of disease following an accident was considered in *Newcomb v. Albertson*, *supra*. The decision there, rested on certain English cases, is to the effect that an injury which follows an accident, and which, but for the accident, would not have happened, justifies the finding that the injury in fact results from the accident.'"¹²

An employee received abrasions on his leg and foot, as the result of an injury arising out of the employment, and alleged that a condition of tuberculosis was accelerated by the injury. The board found that there was no causal connection between the injury and the disease, and that the disease was not due to an injury arising out of the employment.¹³

A night watchman, predisposed to tuberculosis of the bones, fell while acting within the course of his employment and injured his knee. He was taken to a hospital and afterwards discharged. He returned to work and later the injury recurred, necessitating amputation of the leg which was affected with tuberculosis. In affirming the award for an injury arising out of the employment, the court said that the evidence clearly discloses that the disabili-

12. *Lundy v. George Brown & Co.* (1919), 93 N. J. L. 107, 108 Atl. 252, 5 W. C. L. J. 294; *Glennon's Case*, — Mass. —, (1920), 128 N. E. 942, 7 W. C. L. J. 210.

13. *McCarthy's Case*, 120 N. E. 852, 231 Mass. 259, 3 W. C. L. J. 141.

ty was due to an injury arising out of and in the course of the employment. The fact that the employee may have been predisposed to tuberculosis of the bone is immaterial, as the evidence clearly shows that the tuberculosis of the left knee developed as a result of the injury.¹⁴

An employee was working on a crane when one of the timbers broke. He jumped into the river to save himself, and the exposure which resulted caused pulmonary tuberculosis. It was held that he suffered an accidental injury that arose out of and in the course of the employment.¹⁵

Where an employee received a blow over the spine which excited a preexisting tubercular condition to such virulent activity as to totally incapacitate the employee for work, the court, in affirming an award for accidental injury arising out of the employment, said: "Likewise the courts, consistent with the theory of workmen's compensation acts, hold with practical uniformity that, where an employee afflicted with disease receives a personal injury under such circumstances as that he might have appealed to the act for relief on account of the injury had there been no disease involved, but the disease as it in fact exists is by the injury materially aggravated or accelerated, resulting in disability or death earlier than would have otherwise occurred, and, the disability or death does not result from the disease alone progressing naturally as it would have done under ordinary conditions, but the injury, aggravating and accelerating its progress, materially contributes to hasten its culmination in disability or death, there may be an award under the compensation acts."¹⁶

§ 357. **Typhoid Fever.**—An employee received an injury in the course of his employment when a belt broke and struck him in the face. Later he was taken down with pneumonia and ty-

14. *Wabash R. Co. v. Indus. Comm.* 286 Ill. 194, 121 N. E. 569, 3 W. C. L. J. 435.

15. *Rist v. Larkin & Sangster*, 156 N. Y. S. 875, 171 App. Div. 71, 15 N. C. C. A. 688.

16. *In re Bowers*, *In re Williams*, *In re Colan*, 64 Ind. App. —, 116 N. E. 842, 15 N. C. C. A. 633.

Note: For additional cases on this subject see § 254 ante.

phoid fever. The medical testimony was to the effect that the traumatic injury was likely to have caused the pneumonia. The court held that there was sufficient evidence to justify a finding that the pneumonia and typhoid fever were caused by the injury arising out of the employment, and that death was the direct result of these diseases.¹⁷

Where an employee contracted typhoid fever as the result of drinking contaminated water furnished by the government, and it later developed into pneumonia and empyema, it was held that this was not an accident arising out of the employment.¹⁸

A nurse in a hospital contracted typhoid fever, but the evidence failed to show how or where she contracted the disease. It was held that the evidence failed to show that the typhoid fever was caused by or arose out of the employment.¹⁹

§ 358. **Ulcers.**—Where an employee splashed lye water in his eye, and a corneal ulcer developed, it was held to be an injury arising out of the employment.²⁰

Where the evidence showed that ulcerative endocarditis was not caused by the accidental injury, compensation under the Federal Act was denied.²¹

§ 359. **Unintentional Injury by a Fellow Employee.**—Where an employee, while seeking instructions from another employee who was leaning over, placed his arm about the fellow employee's neck, and in doing so a pencil in the pocket of the employee seeking instructions pierced the eyeball of the fellow employee, the court held that the injury, though received in the course of the employment; did not arise out of the employment, for it resulted

17. *Vogeley v. Detroit Lbr. Co.*, 196 Mich. 516, 162 N. W. 975, 15 N. C. C. A. 641.

18. *Re Claim of Robert K. Potter*, Op. Sol. Dep. C. & L. (1915), 72.

19. *Tobin v. City & County of San Francisco*, (1916), 3 Cal. I. A. C. 314; *Collins v. Oakdale Irrigation District*, 3 Cal. I. A. C. 344.

Note: See same title § 256 ante.

20. *Grimes v. The Red River Lbr. Co.*, 3 Cal. Ind. A. C. 66.

21. *In re Carl A. Carlson*, 3rd. A. R. U. S. C. C. 120.

Note: See § 257 ante.

from the sportive act of a fellow employee, and was not incidental to the employment.²²

An employee fainted after a dispute with her employer, and fellow employees brought a glass of ammonia and a glass of water. By mistake the ammonia was thrown in her face, burning her seriously. The court said: "Clearly the injuries so received by her were accidental and arose in the course of her employment, but they did not arise out of such employment. If she had fainted because of fumes present in the work room and so falling had injured herself, a different question would have been presented; but the claimant fainted because of her physical condition, and even if her faintness might have been said to have resulted from her quarrel with her boss with regard to her work, the fainting was in no proper sense connected with the accident. The accident was caused by a co-employee mistaking the two glasses containing ammonia and water, not because the ammonia was exposed and an error arose as to its nature or use. The employee who obtained it knew precisely what it was. The employer had not furnished the ammonia as medicine for his employees nor had he authorized in any way its use by them as a medicine. A fainting such as is shown in this case and help such as was given is not a natural incident to the business. It has no more connection with it than if a physician had been called in and having been handed glasses of ammonia and water had made the same mistake."²³

An employee threw a missile at a fellow employee without any intention to injure him, but it struck him in the eye destroying the vision of one eye. The practise of boys throwing these missiles during working hours was known or could have been known to the employer by the exercise of ordinary diligence. The injured employee never participated in this sport. Affirming an award in favor of claimant, the court said: "The rule is well enough settled that where workmen step aside from their employment and engage in horseplay or practical joking, or so engage while continuing their work, and accidental injury results, and in general where one in sport or mischief does some act re-

22. *Markell v. Green Felt Shoe Co.*, 221 N. Y. 493, 116 N. E. 1060.

23. *Saenger v. Locke*, 220 N. Y. 556, 116 N. E. 367.

sulting in injury to a fellow worker, the injury is not one arising out of the employment within the meaning of compensation acts. * * * Here we conceive the situation to be different. Filas was exposed by his employment to the risks of injury from the throwing of sash pins in sport and mischief. He did not himself engage in the sport. His employer did not stop it. The risk continued. The accident was the natural result of the missile-throwing proclivities of some of Filas's fellow workers and was a risk of the work as it was conducted."²⁴

Where a taxicab chauffeur was injured while scuffling with a fellow employee while he was awaiting a call, the court held that he was not engaged in any act incident to his employment, and therefore his injury did not arise out of the employment.²⁵

Where an employee, while running to punch the time clock when the noon whistle blew, collided with a fellow employee, breaking several ribs, one of which punctured his lung causing death, the court said: "At the time of the accident, Raynor was in the performance of a duty imposed upon him by his employer. The performance of this duty, if not the proximate cause, was a concurring cause of the injury."²⁶

§ 360. **Using Elevator Contrary to Instructions.**—An employee was injured while bringing some goods from another floor at the direction of his foreman. There was a notice in the elevator forbidding anyone except the regular elevator operator to use the elevator. The evidence tended to show that it had been customary for other employees to use the elevator when the operator was not at his post. In the present case the operator was absent, and in an attempt to use the elevator the foot of the employee

24. State ex rel. Johnson Sash & Door Co. v. District Court of Hennipen Co., 140 Minn. 75, 167 N. W. 283, 16 N. C. C. A. 921, 2 W. C. L. J. 95.

25. Dunbar v. Horace F. Wood Transfer Co., Indiana Ind. Bd., (1916), 12 N. C. C. A. 250.

26. Raynor v. Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665, 4 N. C. C. A. 851, L. R. A. 1916A 22, Ann. Cas. 1916A 386.

Note: For case on injuries suffered as the result of an act of a fellow employee see titles "Sportive Acts" § 285 ante, "Willful Misconduct," § 283 and 284 ante.

was crushed. It was held that under the circumstances the accident arose out of the employment.²⁷

An employee was in the habit of using an elevator in the adjoining portion of a building, which he was not supposed to use in bringing materials to the office. While there was evidence tending to show that the use of the elevator was contrary to orders, there was also evidence to the effect that the employer knew of the practise and never considered it of a nature sufficiently serious to merit a rebuke. The court affirmed a finding of the commission to the effect that the employer acquiesced in the custom, and even though the "boy, who was 16 years of age and had never worked out before, may have been somewhat at fault, does not deprive the claimant of the right to compensation. *N. Y. Central R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629. The presumption is that the case comes within the Workmen's Compensation Law, Sec. 21."²⁸

Where a night watchman was found dying at the bottom of the shaft of an elevator which he was forbidden to use, the court held that the evidence was insufficient to justify a conclusion that deceased was at the elevator shaft in the performance of his duties.²⁹

The regular operator of an elevator was absent, and the applicant secured an engine tender to operate the lift in order to enable him to take coal to the upper floors, and while ascending his heel became caught and was seriously injured. It was held that applicant was doing what he was told to do, and in getting another employee to operate the lift and not touching it himself sufficiently complied with the instructions forbidding him to use the lift, and therefore his injury arose out of the employment.³⁰

27. *Kreutz v. R. Neuman Hardware Co.*, 37 N. J. L. J. 58. 12 N. C. C. A. 486.

28. *Smith v. H. J. Bartle Mfg. Corporation* (1919), 189 App. Div. 426, 178 N. Y. S. 589, 5 W. C. L. J. 306.

29. *Moyer v. Packard Motor Car Co.*, (1919), 171 N. W. 403, 205 Mich. 503, 3 W. C. L. J. 756, 18 N. C. C. A. 1028.

30. *Marshall v. Joseph Rodgers & Sons Ltd.*, (1918), W. C. & Ins. Rep. 39, 17 N. C. C. A. 381.

Where an employee, engaged in operating an engine in the basement, goes to an upper floor and volunteers to take fellow employees to a floor above in an elevator, and is killed in so doing, his conduct took him outside the scope of his employment, and an injury so sustained did not arise out of the employment.³¹

§ 361. **Using Machinery Other than that Employed to Use.**—A boy employed as a general roustabout in a factory was subject to orders from different foremen. On the day of the accident the boy was set to work making hoops. While so engaged another foreman requested him to make a box, and the boy undertook to operate a circular saw in preparing boards for the box, and while thus engaged his hand came in contact with the saw sustaining injuries. "Plaintiff contends that defendant was not acting within the scope of his employment in undertaking to make the boxes; that he had no right to undertake the operation of the saw; and that had he followed the instructions of his foreman he would then have been engaged in unloading lumber from the car. Defendant testifies that on one or two other occasions he had used the saw under instructions from Altmann, and his testimony in this respect is not disputed. The record shows that he was subject to the orders of different foremen. These several foremen may have differed in rank, but defendant had during his employment taken orders from each of them. He was only a boy of immature years. As shown by the testimony quoted of the foreman who employed him, it was his duty to 'do anything in the line of common labor around the shop.' This being true, he cannot be held to the strict accountability of his acts. Accustomed as he was to take orders first from one foreman and then from another, when the foreman of the oleomargarine department signified his desire that defendant make a box, he might well assume that it was his duty to obey, and that that order countermanded the order given by the other foreman earlier in the day to assist in unloading the car of lumber. It is clear that he was engaged about the premises where his services required his presence, during proper hours of service, and that his labor was calculated to promote the master's business.

31. *Waters v. Wm. Taylor Co.*, 218 N. Y. 248, 112 N. E. 727.

He had theretofore used the saw under the eye, if not under the direction of his immediate foreman, Altman, and at the time the accident occurred he was carrying out the order, implied, if not directly expressed, of one of plaintiff's foremen, who stood watching him as he worked."³²

Where a night watchman was injured while using a circular saw to obtain a board to barricade a door, the court, in annulling an award, said: "Assuming that it was within the scope of the applicant's employment to see that the doors of the premises were properly secured by locking, nevertheless we are of the opinion that his resort to the use of a circular saw for the purpose of making a board that would answer the purpose of extending across the door was entirely beyond the scope of his employment, and not in the contemplation of his employers, and was not a resort to reasonable means for the purpose of securing the end intended by him at that time."³³

Where an employer knows of and acquiesces in a practise among employees of exchanging work, an injury sustained, while exchanging work with a fellow employee, arises out of the employment.³⁴

§ 362. **Volunteers.**—An associate member of a fire department was killed while assisting the chief engineer of the fire department in extinguishing a fire. An associate member was under no obligation to respond to fire alarms. The city recognized the fact that Cole was performing the duties of an active member and paid the sum required under the general municipal law. The fire had occurred on the premises of Cole's employer and his dependents sought compensation from the employer manufacturing company for his death. The court, in reversing an award, said: "The accident to Cole did not arise out of or in the course of his employment, nor was it incidental thereto. The accident occurred

32. *Morris & Co. v. Cushing*, (1919), 172 N. W. 691, 103 Neb. 481, 4 W. C. L. J. 268, 18 N. C. C. A. 1029.

33. *Brusster v. Indus. Acc. Comm.*, 35 Cal. App. 81, 169 Pac. 258, 15 N. C. C. A. 278.

34. *Sunnyside Coal Co. v. Indus. Comm.*, — Ill. —, (1920), 126 N. E. 196, 5 W. C. L. J. 697.

Note: See "Added Risks to Peril," "Emergency," "Volunteers."

while he was rendering services as a fireman, and while he was subject to the control and direction of the chief engineer of the fire department, and not of his employer. The fact that the fire occurred on the premises of his employer was a coincidence. If it had occurred elsewhere the legal aspect of the case would not be different. Cole may have responded more willingly because the fire was on his employers' premises. It is impossible to determine whether he did or not. It is immaterial. No duty required him to act. No request to do so came from his employer. His allegiance and duty were to the organization with which he was acting, and to the orders, direction, and control of its chief engineer alone he was subject. We do not hold that if the deceased, pursuant to a request of his employer, had acted as a fireman, with the acquiescence of the chief engineer of the fire department and subject to his orders, liability would not exist on the part of the appellants. But such request by the employer was not expressed, and the circumstances clearly are not such as to justify an inference of an implied request, even assuming that an implied request would create liability against the appellant."³⁵

Where one employed to operate paint mixers volunteered to remove a belt, which in no way affected his work, and in so doing sustained injuries, the court, in holding that the injuries did not arise out of the employment, said: "In the instant case deceased was neither required nor expected to assist in adjusting this belt. The foreman had called two men to help, and it is apparent no more were needed. It was merely a question of time until the belt would have been adjusted. There was no emergency. The condition of that belt did not affect the part of the work which deceased was employed to do. Deceased here volunteered his services, and before his foreman could command him not to perform the service he had placed himself in such a position that he could not save himself from injury. A 'volunteer' is one who introduces himself into matters which do not concern him and does or undertakes to do something which he is not bound to do, which he has not been in the habit of doing, with his employer's knowledge or consent,

35. *Cole v. Fleischmann Mfg. Co.*, 189 App. Div. 306, 178 N. Y. S. 451, 5 W. C. L. J. 95.

or which is not in pursuance of any interest of the master and which is undertaken in the absence of any peril requiring him to act as on an emergency. As it appears from the testimony of the fellow employees of deceased that deceased was volunteering his services and was of his own volition intermeddling with something entirely outside the work for which he was employed, the judgment of the circuit court must be and is affirmed."³⁶

The third man in attendance on a traction engine was killed when he fell from the moving engine and was run over. Deceased was cleaning the lamps of the engine at the time of the accident. In holding that the accident did not arise out of the employment, the court said: "I think that the county court judge was quite right. There is unchallenged evidence that it was no part of the duty of a third man to attend to the lamps. The driver said in his evidence that if a lamp was burning dimly and the third man noticed it, he might tell the driver, who might stop the engine and then attend to it himself, or the third man might, if they stopped to do it. If the deceased had been injured while attending to a lamp in such a case, the accident would have arisen out of the employment, but the evidence does not go to that. The evidence is uncontradicted that the deceased had nothing to do with the lamps or machinery. Of course, if it were a case of emergency or if the man had been asked to do it by the driver, different considerations would arise. I think that the appeal must be dismissed."³⁷

A girl, while in search of a foreman to be definitely assigned to some particular work, attempted to pick some loose threads from a machine, a custom existing in the plant and not prohibited, and in doing so her hand became caught and injured, necessitating its amputation. It appeared that the applicant had no duty to cause her to interfere with the machine at which she was injured; that she was not requested by the operators to assist them, and there

36. *George S. Mephram & Co. v. Indus. Comm.*, (1919), 124 N. E. 540, 289 Ill. 484, 5 W. C. L. J. 36.

37. *Payne v. Curtis & Son*, (1915), W. C. & Ins. Rep. 501, 15 N. C. C. A. 273; *Re Claim of Simpson*, Op. Sol. Dep. C. & L. (1915), 316; *Delong v. Krebs*, 1 Cal. I. A. C. D. 592; *Adams and Westlake Co. v. Indus. Comm.*, -- Ill. --, (1920), 127 N. E. 168, 6 W. C. L. J. 8.

was no necessity for her interference. The court held that the accident arose out of the employment.³⁸

A mere volunteer in the absence of any emergency, is not within the protection of the act.³⁹

In responding to the request of a servant for assistance in doing his work, decedent, not an employee of any of the contractors, was not a mere volunteer or licensee, since the servant had implied authority to obtain such help as was necessary for the performance of his master's work.⁴⁰

Where two railroads maintained parallel tracks over a crossing, and each maintained its own flagman at the point, the death of one of the flagman, while rescuing a child from the tracks of the other railroad, did not arise out of and in the course of the employment.⁴¹

Where an engineer at a pumping station attempted to repair a cross arm, which was broken allowing the electric wires to sag to the ground, he was not a mere volunteer, as an emergency existed which justified his conduct.⁴²

§ 363. **Watchmen.**—Blasted stumps constituted the cheapest fuel to be secured and it was customary to obtain fuel in such manner. A mine watchman, who had not been forbidden to use explosives, was killed while blasting stumps for fuel. It was held that while deceased may have been negligent he was not guilty of such wilful misconduct as would preclude a recovery.⁴³

38. *Beattie v. Alexander Tough & Sons*, (1917), W. C. & Ins. Rep. 93, 1 Sc. L. T. 27, 15 N. C. C. A. 274.

39. *United Disposal and Recovery Co. v. Indus. Comm.*; also *United Engineering Co. v. Same*, — Ill. —, (1920), 126 N. E. 183, 5 W. C. L. J. 682.

40. *Sandon v. Kendall*, — Mass. —, 123 N. E. 847, 4 W. C. L. J. 501.

Note: See "Emergency."

41. *Priglise v. Fonda J. & G. R. Co.*, 183 N. Y. App. Div. 414, 6 W. C. L. J. 487.

42. *Young v. Miss. R. Power Co.*, — Ia. —, (1921), 180 N. W. 986.

43. *Ocean Acc. & Guar. Corp. Ltd. v. Pallaro*, (Colo.), (1919), 180 Pac. 95, 4 W. C. L. J. 15.

A watchman at a trench where gas was escaping was found in the trench in the morning asphyxiated. In holding that the death was due to an accident arising out of the employment, the court said: "In such an environment the natural presumption is that the deceased met death while engaged in his occupation. There was no evidence that between 4 and 6 o'clock in the morning he voluntarily entered the trench for any purpose incompatible with his duty, nor was there evidence that he was non compos or abnormal and unable to appreciate and realize the necessary incidents of the danger which surrounded him, and to guard against the manifest and inherent perils of which he was enjoined to warn the public. In the absence of proof to that effect, the theory of suicide must be eliminated from the case, for the rule seems to be settled that where a person is found dead the presumptions are that his death was natural or accidental, unless the evidence shows him to have been insane, that suicide will not be presumed, and that the fact of death in an unknown manner creates no such presumption."⁴⁴

Where a night watchman's body was found at the bottom of a stairway of one of the buildings which he patrolled, the court, reversing a finding that deceased was not engaged in a hazardous employment, said: "An employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which the employment is claimed."⁴⁵

Where a night watchman disappeared while on duty, and all the circumstances at least inferentially pointed to murder, the court said: "The burden was upon the applicant to establish by competent proof the death of Shea. Doubtless such proof may be made by circumstantial evidence, and the actual finding of the body is

44. *Manziano v. Pub. Serv. Gas. Co.*, 92 N. J. L. 322, 105 Atl. 484, 3 W. C. L. J. 488.

45. *Fogarty v. National Biscuit Co.*, 221 N. Y. 20, 116 N. E. 346, 16 N. C. C. A. 639; *Rev'g*, 175 N. Y. App. Div. 729, 161 N. Y. S. 937; *Kabyra v. Adams*, 162 N. Y. S. 269, 14 N. C. C. A. 430, 176 App. Div. 43.

not an indispensable requisite to a conclusion, in a civil case, that one had met his death by violence."⁴⁶

Where a nightwatchman died from heart failure, which was accelerated by the excitement caused by the breaking out of a fire in the plant, the court, in holding that the death was due to an accident arising out of the employment, said: "In the instant case the whole circumstances, including the fire, the overexertion and the excitement of the deceased, may be said to have been an accident. It certainly was a fortuitous circumstance. The fact that the man's condition predisposed him to such an accident or stroke must be, under the authorities, held to be immaterial. While the exertion and excitement which accelerated the heart action were not the sole, proximate cause of the death, they were both certainly concurring causes."⁴⁷

Where a night watchman obtained permission to leave his work and to take charge of an engine, was struck by the yard engine and killed, the court held that the watchman was away by permission and was not without the scope of his employment, and further, the moment deceased had started in the direction of the engine he would be again within the ambit of his employment, even if he had left it temporarily.⁴⁸

Where a watchman, whose duties were to guard an ice pond and prevent anyone from cutting holes therein for the purpose of fishing, was drowned when the ice broke, it was held that the accident arose out of his employment.⁴⁹

Where a night watchman was wounded when his pistol fell from its holster and discharged,, the court held that, since deceased was engaged in chasing away trespassers from a train engaged in interstate commerce, he was at that time engaged in interstate

46. *Western Grain & Sugar Co. v. Pillsbury*, 173 Cal. 135, 159 Pac. 423, 14 N. C. C. A. 430.

47. *Schroetke v. Jackson Church Co.*, 193 Mich. 616, 160 N. W. 383, 15 N. C. C. A. 636.

48. *Conyee v. Canadian Northern R. Co.*, 5 Western Weekly Rep. 607 (1913), 12 N. C. C. A. 898.

49. *Jillson v. Ross*, 38 R. I. 145, 94 Atl. 717.

commerce, and not within the protection of the compensation act.⁵⁰

Where proof was offered that an injury to a railroad yard watchman occurred in the place he would be while performing his special duty of watching for thieves on an interstate train, this is not inconsistent with his then being engaged in his general duties of watchman, and the burden of proving that he was engaged in interstate commerce rests upon the employer seeking to escape liability under the workmen's compensation act.⁵¹

Where an employer knew that the paymaster kept a pistol, and failed to require that the pistol be kept out of sight of a fifteen year old errand boy, injuries to a watchman, through the accidental discharge of the pistol while the boy was playing with it was due to a risk of the employment.⁵²

§ 364. Window Cleaner Falling From Ledge.—A porter in a saloon was injured when he fell from a second story window, which he was cleaning in the apartment of his employer. The regular duties of the porter did not include the cleaning of the apartment windows, and when he did clean such windows he received compensation for it separate from his regular salary. The board held that he was doubly excluded from the protection of the act, for he was a casual employee, and not performing duties in connection with the line of business of the employer at the time of the injury.⁵⁴

A window cleaner fell while passing from one window to another by means of a narrow ledge on the outside, instead of going inside in safety. It was held that the accident arose out of the employment.⁵⁵

50. *Smith v. Indus. Acc. Comm.*, 26 Cal. App. 560, 147 Pac. 600, 8 N. C. C. A. 1065.

51. *Atchison T. & S. F. Ry. Co. v. Indus. Comm.*, 290, Ill. 590, 125 N. E. 380, (1919), 5 W. C. L. J. 364.

52. *Marchiatello v. Lynch Realty Co.*, — Conn. —, 108 Atl. 799, 5 W. C. L. J. 498.

54. *Castellotti v. McDonald*, 1 Cal. I. A. C. 351, 11 N. C. C. A. 375.

55. *Bullworthy v. Glanfield*, (1914), 7 B. W. C. C. 191.

Where a janitor employed by the city of Boston was required to perform duties ranging from window washer to fireman of the boiler, and was injured when he fell from a window ledge while engaged in washing a window, the court held that in determining whether a janitor is a laborer, mechanic, etc., within the Massachusetts Act, the specific duties of the particular janitor in question must be considered, and a finding that this janitor came within the class of laborers entitled to the protection of the act when injured in the course of his employment was, in view of the evidence, justifiable.⁵⁶

56. White's Case, 226 Mass. 517, 116 N. E. 481, 14 N. C. C. A. 951.

CHAPTER VII.

DEATH'S BENEFITS, FUNERAL EXPENSES AND DEPENDENCY.

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§ 365. **Death Benefits.**—The English act provides that the amount payable to dependents, in case of death, must be reasonable and proportionate to their injury, and the exact amount is to be determined for each case by the arbitration committee. This language required English courts, in cases of partial dependency, to inquire whether the deceased was a financial asset and whether his death was a financial injury to the dependents.¹

In the United States the methods provided for determining compensation for death vary considerably, and do not in all cases depend upon the fact that the deceased was an actual financial benefit to his dependents. It is sufficient under some acts that at the time of the injury, there were parties receiving his earnings. So it has been held under the Connecticut act that if the dependent was legally entitled to the wages of a minor or actually received his wages, it was immaterial that the cost of the minor's support used up all of his contributions.²

The benefits for death in many cases in the United States are based upon the annual earnings of the deceased, and in most cases approximate three or four years of the deceased employee's earnings. Alaska and Wyoming provide for fixed amounts without any reference to wages.³

Porto Rico provides for \$1500.00 plus 75% of wages for 208 weeks.⁴ Five states provide for annual earnings for three or four years.⁵ The majority of states apply a wage percentage for speci-

1. *Hodgson v. Owners of West Stanley Colliery*, (1910), 3 B. W. C. C. 260.

2. *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025; *Koether v. Union Hdw. Co.*, 1 Conn. Comp. D. 38; *Metal Stampings Corp. v. Indus. Comm.*, 285 Ill. 528, 121 N. E. 258, 3 W. C. L. J. 258; *In re Peters*, 64 Ind. App.—, 116 N. E. 848, 16 N. C. C. A. 183.

3. Alaska and Wyoming. 4. Porto Rico. 5. California, Kansas, and New Hampshire, for 3 years; Illinois and Wisconsin for 4 years.

fied periods. Of these, one⁶ pays compensation for 260 weeks, one⁷ pays for 270 weeks, ten pay for 300 weeks,⁸ four for 312 weeks,⁹ one pays for 335,¹⁰ one for 350 weeks,¹¹ one for 360 weeks,¹² five pay for 400 weeks,¹³ three pay for 416 weeks¹⁴ and one pays 500 weeks.¹⁵ Four states provide for benefits until the death or remarriage of the widow or dependent or invalid widower.¹⁶ The Oklahoma law does not cover fatal accidents.

Most states provide for a uniform rate in death cases, but in 18 states the compensation varies with conjugal conditions and the number of children, the percentage, ranging from 10 to 66 $\frac{2}{3}$ percent of the average weekly wages of the deceased employee.¹⁷ Where there are provisions for children as beneficiaries, the payments in their behalf usually terminate on their reaching the age of 16 or 18 years, but many of these provide that the payments will not cease at the ages named if the recipient is physically or mentally incapacitated from earning a livelihood.

The remarriage of a widow is made to terminate the benefits in a number of states,¹⁸ though in a few instances a lump sum is payable on such remarriage.¹⁹ If the beneficiary is a dependent widower provision is made in two states for a similiar allowance in case of remarriage,²⁰ in one state if there are children,²¹ and

6. Vermont, 7. Delaware. 8. Indiana, Iowa, Louisiana, Maine, Michigan, Minnesôta, New Jersey, New Mexico, Pennsylvania, and Rhode Island.

9. Colorado, Connecticut, Hawaii and Utah. 10. Kentucky. 11. Nebraska, 12. Texas, 13. Nevada, Arizona, Tennessee, Idaho & Montana. 14. Maryland, Ohio & South Dakota. 15. Massachusetts. 16. New York, Oregon, Washington, and West Virginia.

17. Alaska, Delaware, Hawaii, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Vermont, Washington, West Virginia, and Wyoming.

18. Kansas, Indiana, Kentucky, Louisiana, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Vermont, Washington, West Virginia and United States. Minnesota and Nebraska if there are children, and Maryland unless there are dependent children.

19. New York, Washington, Wyoming. In Colorado and Minnesota a lump sum is allowed if there are no children.

20. New York and Wyoming.

21. Nebraska.

in one state payments cease unless there are dependent children.²² One state provides for cessation of payments to a dependent husband upon his becoming capable of self support.²³

In the acts of the states mentioned in the foot note hereto provision is made for termination of payments upon the beneficiary's death, or attaining the age of 16 or 18 years.²⁴ Many states provide that in case a beneficiary becomes disentitled to a continuance of the compensation, his share will go to the remaining dependents.²⁵ Six states provide that if death is due to any other cause than the original injury all further liability for compensation ceases.²⁶ One state provides that the commission has authority to apportion benefit payments according to need and equity regardless of priority.²⁷

Minnesota follows the British Act very closely, in that dependants receive a percentage income based upon their pecuniary loss,²⁸ and the salary actually received by the employee at the time of his death represents such loss. Under an express provision of the New York Act. the probable increase of minor's wages had he lived, may be considered.²⁹

The death must result from the injury in order that dependents may be entitled to compensation, therefore where an employee

22. Maryland.

23. Louisiana.

24. Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Vermont, Washington, West Virginia and United States.

25. Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Nebraska, Pennsylvania, Vermont, Washington and Colorado to personal representative or other dependents.

26. Iowa, Kansas, Michigan, Montana, Pennsylvania and Rhode Island.

27. California.

28. State ex rel. Gaylord Farmer's Co.-Op. Creamery Ass'n. v. District Court, 128 Minn. 486, 151 N. W. 182, 9 N. C. C. A. 86.

29. Kilberg v. Vitch, 171 App. Div. 89, 156 N. Y. Supp. 971; Western Pac. R. Co. v. Indus Com.,—Cal.—, 181 Pac. 787, 4 W. C. L. J. 348;

was awarded one hundred weeks compensation but died from other causes before receiving all of the payments, his dependents were not entitled to compensation.³⁰

Death must occur within one year from the date of the accident to entitle deceased's survivors to a right of action under the Louisiana act.³¹

Where there is no voluntary payment on the part of the employer, the Industrial Commission in determining the Compensation payable should also determine the persons entitled to compensation as a result of the deceased's death.³²

§ 366. **Funeral Expenses.**—With one exception the acts of all the states provide a definite maximum amount for funeral expense varying from \$75 to \$150 and in some states a maximum of \$100 or \$200 is allowed for the combined expense of last illness and burial.^{32a}

Under the New York Workman's Compensation act, allowing for reasonable funeral expenses not exceeding one hundred dollars, a claim by a relative for services rendered in connection with the

Hyman Bros. Box & Label Co., v. Indus. Com.,—Cal.,—181 Pac. 784, 4 W. C. L. J. 343.

30. U. S. F. & G. Co. v. Salser, — Tex. Civ. App. —, (1920), 224 S. W. 557 6 W. C. L. J. 716; Heiselt Const. Co. v. Indus. Comm.,—Utah—, (1921), 197 Pac. 589.

31. Monvoisin v. Plant, — La. —, (1920), 85 So. 206, 6 W. C. C. J. 448.

Note: For death benefits and dependency see the following sections of the respective acts; 7, 8g, 21, 24 of Illinois Act; Secs. 36, 37 38, 40 of Indiana Act. Sec's 2477-m 9c, d, e, f, and 2477-m 10 of Iowa Act; Secs 5905 of Kansas Act; Sec's 12, 13, 15, of Kentucky; Sec. 8, (1) (f) of Louisiana Act; Secs. 4f, 51, 57, 58, sec. 4f, 6, 8, of Colorado Act; Part 2, Sec. 5, 8, 12, of Michigan, Act; (Sec. 8207f, 8208 (4-19) of Minnesota Act; (3693 Sec. 143 b), (3663 Sec. 113) (2664 Sec. 114) and (3665 Sec. 115d) of Nebraska Act. Sec. 23 & 24g of South Dakota Act; Sec. 2394-9 of Wisconsin Act, Sec. 10 & 11 of United States Act, Sec. 25, 28f & 30 of Tennessee Act.

32. Henry Pratt Co. v. Indus. Comm., —Ill.—, (1920), 127 N. E. 754, 6 W. C. L. J. 296; Smith-Lohr Coal Mining Co. v. Indus. Comm., 286 Ill. 34, 121 N. E. 231; Keller v. Indus. Com., 291 Ill. 314.

32a. Col., Ky., Md., Mont., N. M., \$75; Ala., Cal., Conn., Hawaii, Idaho, Ind., Ia., N. J., N. Y., N. D., Or., Tenn., \$100; Alaska, Ill., Kan., Mo., Nebr., Ohio, S. D., Utah, \$150. Last illness and burial expense Del., La., Mass., Minn., N. H., Pa., Tex. \$100 and Me., Mich., and R. I., \$200. Arizona reasonable amount. Porto Rico no provision.

burial will not be allowed, where claimant had not expended any moneys.³³

Under Sec. 22 of the California Workmen's Compensation Act, providing that jurisdiction of the commission is obtained upon filing of an application in writing by a party interested, stating the nature of the controversy, or concerning any liability arising out of or incident thereto, where no application was at any time made by one not related to deceased servant for reimbursement for funeral expenses paid by him in the burial of deceased, the commission had no jurisdiction to make an allowance therefor on the ground that it appeared that such third person, a stranger to the record, had made such disbursement.³⁴

In a proceeding under the New Jersey Workmen's Compensation Act, amended in 1913, to obtain compensation for the death of an employee who left actual dependents, it was held error to make an allowance for funeral expenses.³⁵

But the New Jersey Act as amended in 1914, provides that "if death results from the accident, whether there be dependents or not, expenses of last sickness and burial are to be allowed, the cost of burial however not to exceed one hundred dollars.

Under the English Workmen's Compensation Act the reasonable expenses incurred in the burial of deceased may be allowed, except in cases of total dependency, where the amount is arbitrarily determined by the compensation schedule.³⁶

Where the statute provides for funeral expenses, it does not thereby authorize the employer to contract for and limit the amount to be expended by the family, as these are matters to be determined by the relatives of deceased.³⁷

33. *Tierre v. Bush, etc. Co.*, 172 App. Div. 386, 158 N. Y. Supp. 883.

34. *Western Indemnity Co. v. Indus. Acc. Comm.*, 35, 104, 169 Pac. 261, 1 W. C. L. J. 300, 16 N. C. C. A. 816.

35. *Taylor et al. v. Seabrook*, 87 N. J. L. 407 94 Atl. 399, 11 N. C. C. A. 710.

36. *Bevan v. Drawshay Bros. Ltd.*, (1902), 1 K. B. 25, 71 L. J. K. B. 49, 85 L. T. 496, 18 T. L. R. 17, 4 W. C. C. 110.

37. *Konkel v. Ford Motor Co.*, Mich., Ind. Acc. Bull (No. 3) 29, 11 N. C. C. A. 716.

Where funeral expenses exceeding the statutory amount had been paid by parties other than the applicant, the commission held that the claim for the funeral expenses would not be recognized as a lien upon the award.³⁸

The Oklahoma Act does not apply to an accident resulting in death (Art. 6 Sec. 1). This omission was necessary to avoid a conflict with the state constitution.³⁹

The following decisions have been rendered by the California Commission in cases involving burial expenses. In cases of partial dependency, where the total award does not exceed three times the average annual earnings, burial expenses not exceeding \$100 should be charged against the employer, and not against the death benefit awarded to the partial dependent under Sec. 15 (c) of the California Act, as amended.⁴⁰

The entire burial expense cannot exceed \$100, except on consent of the person entitled to the death benefit;⁴¹ and when dependency is total, the burial expenses are to be paid out of the award, at the time of making such award, either to the person to whom the award is made or to the one entitled to receive the funeral expenses.⁴²

Since the award includes the burial expenses, an employer who has paid the expenses of burial has a lien upon the award for reimbursement for the sum advanced.⁴³

Funeral expenses are payable in cases of partial dependency under the California Act.⁴⁴

And where there is no one who can claim compensation, the Commission has authority to adjust a claim made by an undertaker for expenses incurred in burial.⁴⁵

38. *Hefferman v. Morse Detective & Patrol Service Co.*, 2 Cal. 1. A. C. 364 (1915), 11 N. C. C. A. 717.

39. *Lahoma Oil Co. v. State Industrial Commission*,—Okl.—, 175 Pac. 836.

40. *Werly v. Pacific Gas. Co.*, (1916), 3 Cal. Ind. Acc. Com. 254.

41. *Sigman v. Columbia Oil Producing Co.*, 3 Cal. I. A. C. 2.

42. *Pyncheon v. Ernest Higgins Co.*, (1916), 3 Cal. I. A. C. 286.

43. *Cleveland v. Hastings* 2 Cal. I. A. C. 18.

44. *Newman v. Casper Lbr. Co.*, 3 Cal. I. A. C. 102.

45. *H. F. Suhr & Co. v. State Compensation Insurance Fund.*, 2 Cal. I. A. C. 717.

Twenty-seven states provide for burial expenses in case the deceased leaves dependents,⁴⁶ and all of the states, except two,⁴⁷ make similar provision in case of no dependents. In the latter event the entire liability of the employer is limited to such burial expenses, except in four states.⁴⁸ In Idaho \$1000 additional must be paid into the industrial administration fund; in Kentucky \$100 additional must be paid to the personal representative of the employee; in New York \$100 additional is required for the creation of a special fund, from which are to be paid benefits to the employees who sustain successive major injuries, and in Utah \$750 additional must be paid into the state insurance fund if the employer is not insured in the fund.

The payment of funeral expenses by an employer with the understanding that there were no dependents in no way affects his liability.⁴⁹ Under the Federal Act funeral expenses, like medical and hospital expenses, are chargeable against the amount recovered and are not to be charged against the employer in addition to the award.⁵⁰ The allowing of funeral expenses under the Federal Act is discretionary with the commission, therefore, where these expenses are paid by friends of the deceased at the place where he worked, there will be no allowance to the relatives of the deceased.⁵¹ Although the statute provides for funeral expenses not to exceed \$100, in a case where it was necessary to provide a hermitically sealed coffin the commission allowed \$140.25.⁵²

46. Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Porto Rico, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

47. Porto Rico and Oklahoma.

48. Idaho, Kentucky, New York and Utah.

49. *Northrn Redwood Lbr. Co. v. Indus. Comm.* —, Cal. App. —, 166 Pac. 828, A 1 W. C. L. J. 267.

50. In re Geo. W. Drummond, 3rd A. R. U. S. C. C. 97.

51. In re Kathryn Mahoney 2nd A. R. U. S. C. C. 63.

52. In re Frederick A. Jordan, 2nd A. R. U. S. C. C. 63.

DEPENDENTS.

§ 367. Who are Dependents and what Constitutes Dependency.

—The acts generally set forth the classes of persons entitled to claim compensation as dependents. It is therefore essential that the act, under which rights are claimed, be examined. Those decisions of the courts construing the provisions of the statutes relative to who are dependents and what constitutes dependency, which differ somewhat under the different state acts, will be found through out this chapter under their respective classifications.

A constitutional provision authorizing the legislature to enact laws "providing compensation to employees," must be construed to authorize laws not only giving compensation to employees themselves, but also to their dependents.⁵³

No exact standard for the determination of dependency is prescribed by statute and it is difficult, if not impossible, to frame a definition which will include the varying conditions under which dependency may exist.⁵⁴

However, the statutes enumerate who shall be presumed to be dependents, also who may be dependent when actually depending upon deceased for support and one claiming dependency must bring himself within one of the classes enumerated by the statute under which he claims, otherwise the fact that the party was receiving support from decedent will not make him a dependent.⁵⁵

It has been held in California that in order that dependency of certain persons may be established it is immaterial whether their maintenance has been voluntarily and gratuitously assumed or is legally imposed; and the legislative discretion to determine what dependents shall become distributees of the indemnity is not meas-

53. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, Am. Cas. 1917E, 390, 156 Pac. 491; *In re Nelson*, 217 Mass. 467, 105 N. E. 357.

54. *Miller v. Riverside Storage Co.*, 189 Mich. 360, 155 N. W. 462.

55. *Berger v. Thomas Oakes & Co.*, 39 N. J. L. J. 296, 13 N. C. C. A. 468; *Drummond v. Isbell-Porter Co.*, 177 N. Y. S. 525, 188 N. Y. App. Div. 374; 4 W. C. L. J. 535, (1919); *Benjamin F. Shaw Co. v. Palmatory*, — Del. —, (1919), 105 Atl. 417, 3 W. C. L. J. 424; *Bonnano v. Metz Bros.*, 188 N. Y. App. Div. 380, 177 N. Y. Supp. 51, (1919), 4 W. C. L. J. 427; *Birmingham v. Westinghuos Electric Mfg. Co.*, 180 App. Div. 48, 168 N. Y. Supp. 520, 16 N. C. C. A. 189; *In re Derinza*, 229 Mass. 435, 118 N. E. 942, 1 W. C. L. J. 795, 16 N. C. C. A. 87.

ured by the analogies of the Common Law, or the limitations of compensation acts in force at the time the constitutional provision was adopted authorizing the Legislature to enact a compensation act.⁵⁶

Dependency being a question of fact, at least until the facts are found, and the facts as varied as the number of cases, each case must be decided upon its own facts. The first question to be determined is whether or not the claimant suffered loss in respect to his or her support or maintenance. This being found in the affirmative, it is then necessary to determine whether or not the claimant was entitled, legally or morally, to consider the contributions received from deceased as a part of his or her necessary livelihood; that is, whether such contributions formed a part of the sort of support to which the claimant, within considerable radius of reason was entitled. While no exact standard of living can be fixed to a certainty for any given class, still some standard is necessary. If a janitress expended all the contributions received from a son on a wardrobe of silks, no one would likely contend that she was entitled to do so, and that such contributions were a necessary part of her support⁴ at least, not to the full amount of the contributions. On the other hand, a little more latitude might be allowed a stenographer, or other persons whose employment or station in life require better clothes. However, the fact that some persons in the same class of employment and same degree of refinement live independently on less than the independent income of the claimant, aside from the contributions received from the deceased, is not decisive of the question of the claimant's dependency. Hence, in establishing a standard of living as a test, it is necessary to give it considerable elasticity; and this was probably the intention of the legislatures of the various states when they placed such questions within the discretion of the boards and commissions for determination.

The legal obligation of a husband to support his wife, the claimant, the probability that it would have been discharged either voluntarily or under compulsion, the probability that the wife

56. *Moore Shipbuilding Corp. v. Indus. Comm.*, — Cal. —, (1921), 196 Pac. 257.

would have enforced her right if the obligation had not been discharged voluntarily are matters of proper consideration in determining whether or not the wife, at the time of the husband's injury, looked to his earnings for her support.⁵⁷

Dependency under the Utah act, and under most other acts is to be determined upon the facts as they existed at the time of the injury.⁵⁸ But despite this provision a woman is entitled to compensation even though her marriage occurred subsequently to the date of the injury, which resulted in her husband's death for her right under the act is based, not on her dependency but on her wifehood.⁵⁹ The British Act makes dependency a question of fact in all cases.⁶⁰

Under the New York Act, where dependency was established, an award amounting to more than the contributions of deceased to his dependent mother, brothers and sisters was held to be authorized.⁶¹

"A dependent, in law, is one who is sustained by another or relies for support upon the aid of another; who looks to another for support and relies upon another for reasonable necessities consistent with the dependent's position in life. The dependency which justifies an award is personal dependency for support and

57. *New Monckton Collieries v. Keeling*, (1911), A. C. 648, 105 L. T. 337, 27 T. L. Rep. 551, 80 L. J. K. B. 1205, 55 Sol. J. 687, 4 B. W. C. C. 332, 6 N. C. C. A. 240; *McDonald v. Great Atlantic & Pacific Tea Co.*, Conn.—, (1920), 111 Atl. 65, 6 W. C. L. J. 525; *Atwood v. Conn. Light & Power Co.*, — Conn. —, (1921), 112 Atl. 269; *Morris v. Yough Coal & Supply Co.*, — Pa. —, (1920), 109 Atl. 914, 6 W. C. L. J. 210; *Hancock et al. v. Indus. Comm.*, — Utah —, (1921), 198 Pac. 169.

58. *Globe Grain and Milling Co. v. Indus. Comm.*,—Utah—, (1920), 193 Pac. 642, 7 W. C. L. J. 245; *Johnson Coffee Co. v. McDonald*,—Tenn.—, (1920), 226 S. W. 215; *Kelley v. Hoefler Ice Cream Co.*,—App. Div.—, 188 N. Y. S. 584.

59. *Crockett v. International Ry. Co.*, 162 N. Y. S. 357, B 1 W. C. L. J. 1292.

60. *New Monokton Collieries Co. v. Keeling*, (1911), A. C. 648, 80 L. J. K. B. 1205, 105 L. T. 337, 4 B. W. C. C. 332, 6 N. C. C. A. 240; *Simmons v. White*, (1899), 80 L. T. 344. 1 W. C. C. 89, 68 L. J. Q. B. 507.

61. *In re Hess*, 191 N. Y. App. Div. 667, 181 N. Y. Supp. 674, 6 W. C. L. J. 75, (1920).

maintenance—an actual dependency for support consistent with the dependent's position in life. It does not include the maintenance of others whom the dependent is under no legal obligation to maintain, or contributions which merely enable the donee to accumulate money.⁶²

In the absence of evidence to show that deceased's brother was actually dependent upon him, an award in favor of the brother was erroneous. The giving of money to the grandmother of deceased to assist in paying off a mortgage, and not for support, does not constitute her dependent upon him, for the purpose of the compensation law is to provide support for dependents, and not to pay their debts.⁶³

"The test is, not what conditions arise after the accident, but what was the condition at the time of the accident. Here it appears that the grandmother was saving money to pay on the mortgage, and to discharge other obligations, and that she was enabled to do this because 'poor Joe' helped 'out good;' but there is no evidence that her own husband was not in a position to meet his lawful obligations."⁶⁴

62. *Rock Island Bridge & Iron Works v. Indus. Comm.*, 287 Ill. 648, (1919), 122 N. E. 830, 4 W. C. L. J. 33; *Dazy v. Apponaug*, 36 R. I. 81, 89 Atl. 160, 4 N. C. C. A. 594; *Simmons v. White Bros.*, (1899), 1. Q. B. 1005, 68 L. J. Q. B. 507, 1 W. C. C. 89, 80 L. T. 344; *In re Hora*, Ohio Ind. Comm., (1914), 6 N. C. C. A. 242; *Jackson v. Erie R. Co.*, 86 N. J. L. 550, 91 Atl. 1035; *Tirre v. Bus' Terminal Co.*, 172 App. Div. 386, 155 N. Y. S. 883; *McCarthy v. Order of Protection*, 153 Mass. 314; *McDonald v. Great Atlantic & Pacific Tea Co.*, — Conn. —, 111 Atl. 65, 6 W. C. L. J. 525; *Alden Coal Co. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 641, 6 W. C. L. J. 274; *Morris v. Yough Coal & Supply Co.*, — Pa. —, (1920), 109 Atl. 914, 6 W. C. L. J. 210; *Rockford Cabinet Co. v. Indus. Comm.*, — Ill. —, (1920), 129 N. E. 142, 7 W. C. L. J. 280; *McDonald v. Employer's Liab. Assur. Corp.* — Me. —, (1921), 112 Atl. 719; *Richardson Sand Co. v. Indus. Comm.*, — Ill. —, (1921), 129 N. E. 751; *Morgan v. Butte Cent. Mining & Mill Co.* — Mont. —, (1920), 194 Pac. 496.

63. *Mulraney v. Brooklyn Rapid Transit Co.*, 180 N. Y. S. 654, 5 W. C. L. J. 731; 190 App. Div. 774; *Wilkes v. Rome Wire Co.*, 184 App. Div. 626, 172 N. Y. S. 406, 3 W. C. L. J. 174; *Dazy v. Apponaug Co.*, 36 R. I. 81, 4 N. C. C. A. 594, 89 Atl. 160.

64. *Mulraney v. Brooklyn Rapid Transit Co.*, 190 App. Div. 774, 180 N. Y. S. 654, 5 W. C. L. J. 731; *Newton v. Rhode Island Co.*, — R. I. —,

But this does not preclude a consideration of a minor's wage increase, as this rule relates only to ascertaining who are dependents.⁶⁵

Under the Illinois Act, illegitimate children are not included within the protection of the Workmen's compensation act, Section 7 providing for payment of compensation for injury resulting in death, if the employee leaves children or other lineal heirs, whom he is under legal obligation to support. The Supreme Court of Illinois follows the common law rule which is that parents are under no legal obligation to support an illegitimate child.⁶⁶

A minor employee's parents and their family are dependent upon him, if contributions from his earnings are reasonably necessary to support the family; otherwise not.⁶⁷

The decisions on the question of illegitimate children are not in accord. The Connecticut Supreme Court holds that illegitimate children living with and dependent upon deceased for their support, are such dependents as are entitled to compensation.⁶⁸

Minor children in the custody of a divorced wife, where the decree of divorce made no provision for the support of the children by the father and he furnished the children no support after a brief space of time, except gifts of money and clothing when he chose to do so, were held not to be total dependents under the Maryland Workmen's Compensation Law, Sec. 35.⁶⁹

(1919), 105 Atl. 363, 3 W. C. L. J. 527; *Birmingham v. Westinghouse Electric & Mfg. Co.*, 167 N. Y. S. 520, 180 App. Div. 48, 1 W. C. L. J. 241, 16 N. C. C. A. 179; *In re Hess*, 191 App. Div. 667, 181 N. Y. S. 674, (1920), 6 W. C. L. J. 75; *Mac Donald v. Employers' Liab. Assur. Corp.*, — Me. —, (1921), 112 Atl. 719.

65. *Kilberg v. Vitch*, 171 App. Div. 89, 156 N. Y. Supp. 971.

66. *Murrell v. Indus. Comm.*, 291. Ill. 334, 126 N. E. 189; 5 W. C. L. J. 673; *Scott v. Indep. Ice Co.*, 135 Md. 343, (1919), 109 Atl. 117, 5 W. C. L. J. 702.

67. *In re Stewart*, — Ind. App.—, (1920), 126 N. E. 42, 5 W. C. L. J. 514; *Moll v. City Bakery*, 199 Mich. 670, 165 N. W. 649, 1 W. C. L. J. 391, 16 N. C. C. A. 186.

68. *Piccinini v. Conn. Light and Power Co.*, 93 Conn. 423, (1919), 106 Atl. 330, 4 W. C. L. J. 18. Note: For question of Illegitimate Children see title, "What Children may be Dependents," § 374 post.

69. *State Industrial Accident Commission v. Downton*, 135 Md. App. 412, 109 Atl. 63. 5 W. C. L. J. 709.

It has been held that a half brother of a deceased employee, who was living with his mother, but dependent upon and receiving support from the deceased, was an actual dependent within the meaning of the Massachusetts Act; and the fact that deceased gave the money to his stepmother for the support of his half brother was immaterial.⁷⁰

The Texas Act makes dependent brothers of a deceased employee "beneficiaries" within the meaning of Section 8a of the Act.⁷¹

It has been held, under the New York Act, that where a father contributed twelve dollars to a family fund of thirty dollars per week, he cannot be said to be dependent upon a son who contributed a like sum, the dependency upon the son being among the other members of the family.⁷²

"The deceased employee having left a minor daughter, the claimant, his sister, is not the next of kin and can have no claim for compensation unless she was a member of his family partly dependent for support upon his earnings at the time of his death. *Kelly's Case*, 222 Mass. 538, 111 N. E. 395; St. 1911 c. 751, pt. 5, Sec. 2. While the claimant, her minor son and the employee lived together in the house formerly owned by the mother of the sister and brother and who died intestate, the claimant is shown to have had the exclusive management of the household affairs. And she and her son undoubtedly constituted a family. *Murphy's Case*, 224 Mass. 592, 113 N. E. 283. It is uncontroverted that 'nothing was ever said about board.' But even so, it is plain on the record that the weekly payments of the employee contributed for the support of the household whenever he could obtain employment, and the purchase of some incidental household furnishings and supplies as well as his cultivation of the garden did not make him head of the family of which his sister and his nephew could

70. *O'Flynn's Case* (1919), 232 Mass. 582, 122 N. E. 767, 4 W. C. L. J. 105; *Walz v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, 155 N. Y. Supp. 703.

71. *American Indemnity Co. v. Zyloni*, — Tex. Civ. App.—, (1919), 212 S. W. 183, 4 W. C. L. J. 315; *Vaughan v. S. S. Ins. Co.*, — Tex. —, 206 S. W. 920; 3 W. C. L. J. 386.

72. *Klein v. Brooklyn Heights R. Co.*, 188 App. Div. 509, 177 N. Y. S. 67, (1919), 4 W. C. L. J. 432.

be deemed members. *Cowden's Case*, 225 Mass. 66, 113 N. E. 1036.⁷⁷³

"A claim of dependency is not to be defeated by mere proof that the claimant can by the exercise of his best endeavors support himself and family by his own unaided efforts. *Howells v. Vivian*, 85 L. T. R. 529, 530; *Powers v. Hotel Bond Co.*, 89 Conn. 143, 152, 93 Atl. 245. But as it is no purpose of the law to give aid and comfort to slackers in respect of their obligations as members of society, so it is that a claim of dependency will meet defeat if it appear that the claimant by the expenditure of such effort as, under all circumstances, ought fairly and reasonably to be expected of him is of ability to be self and family supporting according to the proper measure of such support."⁷⁴

In discussing the question of the beneficiaries and the distribution of compensation under the Texas Act, the Supreme Court of Texas said: "In fixing the compensation to be paid for injury to an employee of a subscribing employer, sustained in the course of his employment and resulting in death, the Workmen's Compensation Act of 1913 (Acts 33d Leg. c. 179 (*Vernon's Sayles' Ann. Civ. St.* 1914, arts. 5246h-5246zzzz) omitted any express designation of the beneficiaries entitled to receive the compensation. It merely declared (section 8, art. 5246kk) that it should be paid to 'the legal beneficiary' of the deceased employee, with a proviso in the following language: 'Provided, that the compensation herein provided for shall be distributed according to the law providing for the distribution of other property of deceased.' The question here is, how shall the beneficiaries in such cases be determined,—by the law of descent and distribution, or the law governing the recovery of damages for negligent or wrongful injury resulting in death—the death injury statute, article 4698? The act was amended in this particular in 1917, Acts 35th Leg. c. 103, Section 8a (*Vernon's Ann. Civ. St. Supp.* 1918, art. 5246—15), by expressly naming the beneficiaries. This case

73. *In re Murphy*, 230 Mass. 99, 117 N. E. 794, 1 W. C. L. J. 211.

74. *Gherardi v. Connecticut Co.*, 92 Conn. 454, 103 Atl. 668, 2 W. C. L. J. 212; *Simmons v. White*, 80 L. T. R. 344, 1 W. C. C. 89, 15 T. L. Rep. 263, 68 L. J. Q. B. 507, 47 Wkly. Rep. 513.

arises under the original act. The solution of the question is found in the proviso. It says that the compensation shall be distributed 'according to the law providing for the distribution of other property of the deceased.' Interpretation can add nothing to the clearness of this language. It means the law governing the distribution of the decedent's property, not a law authorizing the recovery of damages by certain kindred as their property. The only law we have regulating the distribution of the property of an intestate decedent is that comprised by our statutes of descent and distribution. That is plainly the law referred to. It is, in effect, made a part of the act.⁷⁵

Under the rule that dependency is to be determined on the facts as they existed at the time of the accident, a father living with and dependent upon his son for support at the time of the fatal accident to the son is to be deemed his dependent in preference to a wife married after the accident or a posthumous child with which the wife was pregnant from deceased prior to their marriage.⁷⁶ But New York decisions hold to the contrary.⁷⁷

Compensation goes to those dependent upon the deceased workman, and not those supported by him, who would not otherwise come within the statutory definition of dependents.⁷⁸

"The New York Act does not limit the right to an award to those dependents who had the legal right to compel the deceased to furnish them support, but it applies as well to cases where the

75. *Vaughan v. Southern Surety Ins. Co.*, —, Tex. —, 205 S. W. 920, 3 W. C. L. J. 386.

76. *Kuetbach v. Indus. Comm.*, 166 Wis. 378, 165 N. W. 302, 1 W. C. L. J. 461, 15 N. C. C. A. 842.

77. *Crockett v. International R. Co.*, 176 App. Div. 45, 162 N. Y. Supp. 357, 15 N. C. C. A. 843; holding that the dependency of wife and children are not dependent upon the facts as they existed at time of injury and a wife marrying an injured workman is entitled to compensation for his death, not on the ground of her dependency but on the ground of her wifehood.

78. *In re Derinza*, *In re Pucci*, 229 Mass. 435, 118 N. E. 942, 1 W. C. L. J. 795, 16 N. C. C. A. 87.

person was dependent for support upon the voluntary contributions of the deceased.”⁷⁹

“The test of dependency is not whether the petitioner, by reducing his expenses below a standard suitable to his condition in life, could secure a subsistence for his family without the contributions of the deceased son, but whether such contributions were needed to provide the family with the ordinary necessities of life suitable for persons in their class and position.”⁸⁰

Lord Halsbury in criticising the above definition said: “I decline to assume that the legislature has contemplated a particular ‘standard’, * * * dependent upon * * * the ordinary course of expenditure in the neighborhood and in the class to which the man lived * * * what the family was in fact earning, what the family was in fact spending for its maintenance, as a family, seems to be the only thing which a judge could properly regard.”⁸¹

This rule seems to put a premium on riotous living. “What the family was in fact earning, what the family was in fact spending,” taken as a criterion, would give more to the family if they were extravagant to the extent of spending all income, whether necessary or not, than it would give if the family lived economically, frugally, and husbanded their resources. “What the family was in fact spending,” may bring persons within the role of dependents who would not be such were it not for their extravagance, and may keep others out of that class because of their frugality and industry. It is thought that the better plan is to adopt a standard fixed by the station in life of the persons claiming to be dependents at the time of the accident. This way affords a uniform guide, which will not work hardship on anyone, which will not be generous with the extravagant, nor miserly with the frugal.

79. *Walz v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, 13 N. C. C. A. 464, 155 N. Y. S. 703.

80. *Dazy v. Apponaug Co.*, 36 R. I. 81, 4 N. C. C. A. 594, 89 Atl. 160.

81. *Maine Colliery Co. v. Davies*, (1900), A. C. 358, 80 L. T. 674, 16 T. L. Rep. 460, 1 W. C. C. 92, 6 N. C. C. A. 241; *French v. Underwood*, 19 T. L. Rep. 416, 5 W. C. C. 119, 6 N. C. C. A. 242.

The question of dependency is determined in most jurisdictions upon the law as it existed at the time of the accident, but the Minnesota Supreme Court holds that this questions depends upon the law as it existed at the time of the death.⁸²

Under the New York Act, a mother living with and supported by her husband is not a dependent upon her minor daughter, because of the fact that the daughter turned over part of her wages to the mother.⁸³

To sustain an award to parents for the death of a son, there must be a showing made of actual support by the son during the year prior to the accident.⁸⁴

Parents are dependents under the Illinois act if the son contributed to their support within four years, and they need not have been actually dependent upon him.⁸⁵ And contributions by the minor need not exceed the expenses of the parents in behalf of the minor.⁸⁶

Under the Illinois Act a wife is a dependent of her deceased husband, if he was under a legal obligation to support her, even though she was not living with him and not dependent upon him.⁸⁷

82. *State ex rel. Carlson v. Dist. Court*, 131 Minn. 96, 154 N. W. 661; *State ex rel. Globe Indemnity Co. v. District Court*, 132 Minn. 249, 156 N. W. 120; *Hansen v. Flinn O'Rourke Co., Inc.*, 183 N. Y. S. 213, 6 W. C. L. J. 476.

83. *Frey v. McLaughlin Bros. Co.*, 187 App. Div. 824, 175 N. Y. Supp. 873, (1919), 4 W. C. L. J. 133; *Birmingham v. Westinghouse Electric & Mfg. Co.*, 180 App. Div. 48, 167 N. Y. Supp. 520, 1 W. C. L. J. 241, 16 N. C. C. A. 179.

84. *Profeta v. Retsof Mining Co.*, 188 App. Div. 383, 177 N. Y. Supp. 80, (1919), 4 W. C. L. J. 444.

85. *Humphrey v. Indus. Comm.*, 285 Ill. 372, 120 N. E. 816, 3 W. C. L. J. 102.

86. *Metal Stamping Corp. v. Indus. Comm.*, 285 Ill. 528, 121 N. E. 258, 3 W. C. L. J. 258; *In re Peters*, 64 Ind. App. — 116 N. E. 848, 16 N. C. C. A. 183.

87. *Smith-Loehr Coal Mining Co. v. Indus. Comm.*, 286 Ill. 34, 121 N. E. 231, 3 W. C. L. J. 250; *American Milling Co. v. Indus. Bd.*, 279 Ill. 560, 117 N. E. 147, 16 N. C. C. A. 86; *Goelitz Co. v. Indus. Bd.*, 278 Ill. 164, 115 N. E. 855, 16 N. C. C. A. 80.

The word "widow," as used in the Washington Act, is to be given its ordinary meaning, which is, a legally married woman whose husband is dead. Therefore an honest but erroneous belief that the claimant was married to deceased will not entitle her to compensation as his dependent.⁸⁸ But the Supreme Court of California arrived at an opposite conclusion in construing the act of that state.⁸⁹

In discussing the question of dependency the Supreme Court of Delaware said: "Persons in the enumerated classes may be wholly or partially dependent on the employee and come within contemplation of the provisions of this section if the dependency existed at the time of the injury. The question arises what may be considered dependency? The term has frequently been defined by the courts of this country and of England and we think it not possible to state a complete and exhaustive definition of the word as used in Workmen's Compensation Laws; but the definition stated by the court in the case *In re Hora*, vol. 1, No. 7, Bul. Ohio Industrial Commission, 173, is as satisfactory as any we have seen. The court in that case defined dependency to be 'dependent for the ordinary necessities of life for a person of that class and position in life, taking into account the financial and social position of the recipient.' It is not sufficient that the contributions of the employee were used in paying the living expenses of the claimant, but it must be shown that the contributions of the employee were relied upon by the dependent for his or her means of living judging this by the class and position of life of the dependent. *Powers v. Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245. The fact that a man is by his best efforts able to provide his family with the bare necessities of life would not prevent him from being a dependent under our statute for the words of the statute convey a much broader meaning than this. On the other hand, the mere fact that contributions had been made by

88. *Meton v. State Ind. Ins. Dept.*, 104 Wash. 652, 177 Pac. 696, 3 W. C. L. J. 541.

89. *Tennescal Rock Co. v. Ind. Acc. Comm.*, — Cal. —, (1919), 182 Pac. 447, 4 W. C. L. J. 469.

the deceased workman to a claimant who had the health and ability to support himself and family by his own reasonable efforts but did not do so, would not constitute the claimant a dependent, for it was not the intent of the Legislature to maintain in idleness at the expense of the employer those who are able and have the capacity to provide for themselves and have no appealing reason for not doing so. The condition of health, need for medicine and medical attention are subjects proper for consideration in determining the question of dependency.⁹⁰

A statute which specifies who shall be conclusively presumed to be dependent but makes no provision for sisters or nieces, their dependency must be determined in accordance with the facts at the time of the injury. Therefore a sister who was supported by her brother under an agreement that she keep house for him, although she was a competent stenographer, but was precluded from that position by the condition of her health, was totally dependent upon him, and cannot be deprived of compensation on the ground that she could support herself when she was, as a matter of fact, supported by him.⁹¹

Actual contributions to married daughters were, under the Illinois act of 1913, sufficient to entitle them to compensation on the death of the father, even though they were not dependent upon him for support. This provision has been changed so as to make dependency a condition of compensation. Laws of 1917, p. 490.⁹² Also, support of an incapacitated daughter, 22 years of age, within four years prior to an accident, entitles the daughter to compensation. The provision in regard to the four years was eliminated by amendment in 1919.⁹³

90. *Benjamin F. Shaw Co. v. Palmatory*, — Del —. (1919), 105 Atl. 417, 3 W. C. L. J. 424; *Powers v. Hotel Bond Co.*, 83 Conn., 143, 93 Atl. 245; *Johansen v. Linde & Griffith Co.*, 39 N. J. L. J. 143, 13 N. C. C. A. 318.

91. *In re Lanman*, 64 Ind. App. —, 117 N. E. 671, 1 W. C. L. J. 185.

92. *Peabody Coal Co. v. Indus. Comm.* 281 Ill. 579, 117 N. E. 983, 1 W. C. L. J. 524, 16 N. C. C. A. 143.

93. *Mechanics Furniture Co. v. Indus. Bd. of Ill.* 281 Ill. 530, 117 N. E. 986, 1 W. C. L. J. 529, 15 N. C. C. A. 292.

It has been held by the Supreme Court of Connecticut that a married daughter whose father had made contributions to her, but had not done so for 6 months prior to the date of injury, cannot be said to be dependent on her father when she was amply provided for otherwise.⁹⁴

Under the English Act a grown daughter, capable of earning her own living, may be a dependent, if she was actually depending upon and receiving support from her father, for whom she was keeping house.⁹⁵

Under the New York Act, limiting dependents to the widow and next of kin, it has been held that a mother and half brother and sisters of deceased, who were partially dependent upon deceased, were entitled to compensation.⁹⁶

A niece who stayed with an uncle and was furnished board and clothing while she was going to school, was held not to be a dependent, within the meaning of the Indiana Act.⁹⁷

Under the Nebraska Act, "dependency is not based solely upon a present legal obligation to support," and the question is not determined by the fact that a decedent had or had not contributed to the support, of a parent, before the date of the accident. The fact that the mother had \$300 or \$400 in the bank drawing interest, and her son was not living with or supporting her at the time of his death, does not bar her right to compensation. If the mother needs the support of her son, is legally entitled to it, and there is probability that she will receive it, she is a dependent.⁹⁸

Under the Kansas Act, the court will not inquire into the domestic arrangements of a family or the necessity of reliance upon the decedent's contributions, but if the family is actually dependent

94. *Blanton v. Wheeler & Howes Co.*, 91 Conn. 226, 99 Atl. 494, 16 N. C. C. A. 145.

95. *Simms v. Lilleshall Colliery Co. Ltd.*, 1917 W. C. & Ins. Rep. 218, 16 N. C. C. A. 147.

96. *Bylow v. St. Regis Paper Co.*, 179 App. Div. 556, 166 N. Y. Supp. 874, 16 N. C. C. A. 152; *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 369.

97. *In re Lanman*, 64 Ind. App.—, 117 N. E. 671, 16 N. C. C. A. 156.

98. *Parson v. Murphy*, 101 Neb. 542, 163 N. W. 847, 16 N. C. C. A. 174.

upon the assistance of decedent it is sufficient to entitle them to the benefits provided.⁹⁹

Dependency does not depend upon the fact that contributions take forms other than that of money, or that the contributions are used for purchasing of articles of furniture and the like, instead of other purposes.¹

Under the Michigan Act, making dependency a question of fact, as under the Minnesota and British Acts which seek to compensate the dependents for the loss suffered, it was held, that where the expenses incurred on behalf of the son were equal to or in excess of his contributions, a case of dependency was not established.²

A person need not be reduced to absolute want or be declared a pauper in order to come within the provisions of the compensation act. So the fact that a mother had some small means and other sources of revenue at the time of her son's death did not preclude her from being partially dependent.³

An unmarried sister may be a dependent of deceased, if she was actually supported by him under conditions necessitating his support. As where an unmarried sister who became pregnant appealed to her brother for assistance, and he contributed to her support during pregnancy and after the birth of the child until the time of his death, it was held, in view of the fact that she would need his assistance longer, and that she was capable of working, that she was entitled to compensation as one partially dependent.⁴

Where a deceased employee had been living with his half brother and turned his wages into the family fund, from which he, his half brother and the latter's wife and children were supported, the

99. *Fennimore v. Pittsburg Scammon Coal Co.*, 100 Kan. 372, 164 Pac. 265, 16 N. C. C. A. 176.

1. *In re McMahon*, 229 Mass. 48, 118 N. E. 189, 16 N. C. C. A. 184.

2. *Moll v. City Bakery*, 199 Mich. 670, 165 N. W. 649, 16 N. C. C. A. 186, 1 W. C. L. J. 391.

3. *Rhyner v. Hueber Bldg. Co.*, 171 App. Div. 56, 156 N. Y. S. 903, 13 N. C. C. A. 317; *Walz v. Holbrook, Cabot and Rollins Corp.*, 170 N. Y. App. Div. 6, 155 N. Y. S. 703.

4. *Jackson v. Indus. Comm. of Wis.*, 164 Wis. 94, 159 N. W. 561, 13 N. C. C. A. 458.

court held that the employee was a member of the family of the claimant or half brother who was partially dependent upon his wages for support, but as the employee's father survived and the statute provides that dependents shall mean members of the employee's family or next of kin who were totally or partially dependent upon the employee at the time of the injury, the question arose whether claimant came within this definition. On this point the court, after citing *Daly v. New Jersey Steel & Iron Co.*, 155 Mass. 1, 5, 15 Am. Neg. Cas. 586n (1891); *Welch v. New York, N. H. & H. R. R.*, 176 Mass. 393, (1900); and *In re Herrick's Case*, 217 Mass. 111, 4 N. C. C. A. 554 (1914), continued: "It is plain from not only these decisions but the wording of the statute that, while dependency determines the right to compensation, it is also necessary that the dependent should be in the same degree of kinship as the statutory heir or heirs. It is true that the object of the statute is to provide in place of the wages of the deceased employee the means of sustenance for his widow and other dependents. In *re Cripp's Case*, 216 Mass. 586, 589 (4 N. C. C. A. 546n) (1914). And if dependents are to be ascertained solely from those nearest in blood, it may happen that where a father and mother survive who are not dependent a sister wholly dependent must be denied relief. Or, if the employee leaves no widow but only children who are amply provided for by marriage or otherwise are self-supporting, and an indigent mother wholly dependent upon him, the mother is not within the statute. But the words 'next of kin' as used in our laws uniformly refer to those who are nearest in degree by consanguinity. *Swasey v. Jaques*, 114 Mass. 135 (1887). It must be assumed that this term as used in the statute was intended by the legislature to have this well-recognized meaning, and we cannot construe 'next of kin' as being the equivalent of dependent next of kindred which would embrace all dependents without regard to the degree. * * *

The claimant cites *Caliendo's Case*, 219 Mass. 498 (1914), where the mother and sister of the employee shared equally in the award, but the question whether they were in the same degree of kinship was not raised or considered." The decree affirming the award of compensation was reversed and the claim disallowed.⁵

5. In *re Kelley's Case*, 222 Mass. 538, 111 N. E. 395, 13 N. C. C. A. 459.

The Michigan Court in defining dependency stated that: "The Massachusetts act (chapter 751. St. 1911) contains the same language as to dependency as does our act; it also contains a provision similar to the provision found in our act in section 5443. (C. L. 1915. In *Derinza's Case*, 229 Mass. 435, 118 N. E. 942, the Supreme Judicial Court of that state had under consideration the question of dependency of a wife living apart from her husband, and it was there said:

"The terms of our act award compensation to those dependent upon the 'earnings' of the deceased employee, and not to those supported by him, differing thus from the statutes of some other jurisdictions. See for example, *Crookston Lumber Co. v. District Court*, 131 Minn. 27. Therefore in the case at bar the finding can be supported only if the wife could be found to have been totally dependent upon the earnings of her deceased husband, and not upon investments of his property. This is so, giving to 'earnings' the broadest meaning of which it reasonably is susceptible. *Jenks v. Dyer*, 102 Mass. 235. *Chester v. McDonald*, 185 Mass. 54. The terms of part 2, sections 7 and 12, the latter to the effect that 'no savings or insurance of the injured employee * * * shall be taken into consideration in determining the compensation to be paid' under the act, do not modify and are not in any respect in conflict with the explicit and unequivocal provisions of part 2, section 6, and part 5, section 2, to the effect that dependency in case of death of an employee shall be ascertained solely with reference to the fact whether the claimants were wholly or partly dependent upon the earnings of the employee for support at the time of the injury.

"The language of our act expressly states 'dependent upon his earnings for support.' That the earnings of an employee are distinct and different from rent he receives for a building is patent. The Legislature of this state saw fit to use the precise language of the Massachusetts act and to purposely use the word 'earnings.' We may not eliminate it from our consideration, nor modify it by some other inapplicable portion of the act. The section under consideration deals exclusively with the question of dependency and is quite complete in itself."*

6. *Bolozina v. Castile Mining Co.*, — Mich. —, (1920), 178 N. W. 57, 6

The right of dependents of a deceased employee to receive compensation, is not affected by the fact that the death of the employee was caused by the actionable negligence of a third person, not connected with the employment.⁷

§ 368. **Presumptions Relating to Dependency.**—Under the English Act matters of dependency are questions of fact, while under the majority of the American Acts certain classes of persons are conclusively presumed to be dependent. Thus, a wife is conclusively presumed to be dependent upon a husband with whom she was living at the time of the accident. The same presumption applies to children under the statutory age limit, who were living with the deceased. Children, above the age limit who are mentally or physically incapacitated from earning a living are generally presumed to be dependent upon a deceased parent with whom they were living at the time of the accident. A like presumption has been accorded to husbands who were living with their wives at the time of the fatal accident, although not so universally as the presumption in favor of wives.

As to the presumption of the existence of dependents who are not claiming compensation, it was held in Illinois that where the alien parents of a deceased employee, respectively 60 and 40 years old, were seen at their residence in Russian Poland in August, 1915, the presumption of continuance of life is insufficient to establish the existence of beneficiaries 26 months later; that country having in the meantime been overrun by hostile armies and devastated and robbed of the means of sustenance, the fact of the existence of the beneficiary at the time of the hearing must be affirmatively shown by the applicant.⁸

The fact that the statute provides that a husband or wife shall be conclusively presumed to be dependent each upon the other, does

W. C. L. J. 327; *Finn v. Detroit Ry.*, 190 Mich. 112, 155 N. W. 721, L. R. A. 1916C, 1142.

7. *Ferraro v. La Belle Iron Works*, Ohio Ind. Comm. Dec. 9 N. C. C. A. 596.

8. *National Zinc Co. v. Indus. Comm.*, 292 Ill. 598, 127 N. E. 135, 6 W. C. L. J. 21.

not prevent either of them from being dependent upon another as matter of fact, and recovering compensation by reason of such dependency.⁹

Where a minor son, at the time of an agreement for compensation, was conclusively presumed to be dependent in accordance with the statutory provision, later became self supporting, the court said: "Such dependency was created by the statute as of the time of the injury, and the amount payable, within defined limits, was controlled by the statute, St. 1911, c. 751, part 2, Sec. 6, 7, as amended by St. 1914, c. 708, Sec. 2, 3. Where dependency, as in this case, is not to be determined as a question of fact, but exists by virtue of the statute, it is not affected by the wealth or poverty of the dependent. *Bott's Case*, 230 Mass. 152, 119 N. E. 755; *Gavaghan's Case*, 232 Mass. 212, 122 N. E. 298. In *Bott's Case*, it was held that the remarriage of the dependent widow to one from whom she received ample support did not terminate her right to compensation. This is decisive. There is no distinction between a widow conclusively deemed to be dependent, and a son as to whom the same conclusive statutory presumption exists."¹⁰

Where a husband and wife are living apart, after an interlocutory decree of divorce in favor of the wife, with no provision for support, the wife is not entitled to the presumption of total dependency created by the California Workman's Compensation Act, Sec. 14, Subd. a (1).¹¹ But a wife living apart from her husband, under a decree awarding her separate maintenance, is within the section of the statute, conclusively presuming a wife living with her husband, or for whose support the husband is legally liable, to be dependent upon such husband for support.¹²

9. *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025; *McDonald v. Great Atlantic and Pacific Tea Co.*, — Conn. —, (1920), 111 Atl. 65, 6 W. C. L. J. 525.

10. *Cronin's Case*, 233 Mass. 243, (1919), 124 N. E. 669, 5 W. C. L. J. 80. See Ohio Act 1921 Am. § 1465-82.

11. *London Guarantee & Accident Co. Ltd. v. Indus. Acc. Comm.*, — Cal.—, (1919), 184 Pac. 864.

12. *Continental Casualty Co. v. Pillsbury*, — Cal. —, (1919), 184 Pac. 650, 5 W. C. L. J. 6.

Under the California Act a minor daughter under the age of 18 deserted by her father and living apart from him for a justifiable cause, is not conclusively presumed to be wholly dependent upon him for support, within the meaning of the statute. The court said: "The dependent is not aided by St. 1919, c. 204, passed since the death of her father. As a result of this amendment, total dependency as a minor under the age of 18 and above the age of 15, exists only where the minor is living with the parent at the time of the parent's death; while as to minors under the age of 16, there is such dependency not only where the minor is so living, but also where the parent was at the time of his death legally bound to support the minor although living apart from him. It follows that the dependency created by the statute was not total, but rightly was determined as a question of fact and the decree of the superior court must be affirmed."¹³

It is held under the New York Act that there is no presumption that the alien non resident parents of an employee 32 years of age are dependent upon him. The fact of dependency must be proved.¹⁴

Under the Minnesota Act, children under 16 years of age are conclusively presumed to be dependents, while those between sixteen and eighteen are prima facie presumed to be dependent.

Where the deceased was the mother of several children under 16 years of age, and the father had for several years prior to her death deserted the family, such children are to be regarded as orphans coming within subdivision 10, sec. 5c, 209, Laws 1915 (Gen. Stat. Supp. 1917, Sec. 8208) for the purpose of fixing the amount to be paid under the compensation Act.¹⁵

A daughter, by a former wife of deceased, over 18 years of age, married and living with her blind husband, she being totally blind, and therefore physically incapacitated from earning, claimed her share in the death benefits. The court citing the following statute:

13. *Moran's Case*, — Mass. —. (1919), 125 N. E. 157, 5 W. C. L. J. 249.

14. *Pifumer v. Rheinstein & Haas, Inc.*, 187 App. Div. 821, 175 N. Y. Supp. 848, 5 W. C. L. J. 136.

15. *State ex rel. Radisson Hotel v. District Court of Hennepin County*, 143 Minn. 144, 172 N. W. 897, 4 W. C. L. J. 418.

“ * * * Provided, that in the event of the death of an employee who has at the time of his death a living child or children by a former wife or husband, under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning), said child, or children shall be conclusively presumed to be wholly dependent for support upon such deceased employee, and the death benefit shall be divided between the surviving wife or husband and all the children of the deceased employee in equal shares, the surviving wife or husband taking the same share as a child” then continued: “In the case of a child of a former wife or husband the Legislature considers neither the wealth, poverty, residence nor legal rights to support of that child, and concerns itself only with the question: Is the child under eighteen years of age, and if over, is he or she ‘physically or mentally incapacitated from earning. If under eighteen years of age or physically or mentally incapacitated from earning, the child is conclusively presumed by the terms of the act to be wholly dependent for support on the deceased employee. Upon the agreed facts the child is physically incapacitated from earning; it follows that the daughter Anna F. Mason is entitled to an equal share in the death benefit with the surviving widow. St. 1911, c. 751, part 2, Sec. 7 (c), as amended by St. 1914, c. 708, Sec. 3 (c).”¹⁶

It is held under the Massachusetts Act, that an alien's widow, residing in a foreign country, is not entitled to the benefit of the conclusive presumption of dependency; the question being one of fact.¹⁷

In a Wisconsin case the court said: “Having properly held that she was living with her husband at the time of his death, then section 2394-10, subd. 3 (a), establishes a conclusive presumption that she was solely and wholly dependent upon him for support. That she had property of her own, even were the

16. *Gavaghan's Case*, 232 Mass. 212, (1919), 122 N. E. 298, 3 W. C. L. J. 643; *Botts Case*, 230 Mass. 152, 119 N. E. 755; *Holmberg's Case*, 231 Mass. 14, 120 N. E. 353; *Coakley v. Coakley*, 216 Mass. 71, 102 N. E. 930. *Ann. Cas.* 1915A, 867, 4 N. C. C. A. 508.

17. *Perotti's Case*, 233, Mass, 297, (1919), 123 N. E. 776, 4 W. C. L. J. 391; *Kalcic v. Newport Mining Co.*, — Mich. —, 163 N. W. 962, A. 1 W. C. C. L. J. 948.

income therefrom sufficient to, and for a time actually had been alone used for her support, would be entirely immaterial." ¹⁸

The Michigan Act provides that a wife and husband living together and children under 16, or older if incapacitated, are conclusively presumed to be totally dependent. This is true even though the wife from time to time lives apart from the husband in order to work and support herself. These facts are immaterial if they are living together at the time of the fatal accident. ¹⁹

Illegitimate children of a decedent are not conclusively presumed to be dependent on him, within Maine Rev. Stat. c. 50, Sec. 1, Subd. 8 (c) under the rule, "*Expressio unius est exclusio alterius*." ²⁰

Under the Indiana Act, a child 13 years of age not living with her father and to whose support he had not contributed for several years, though ordered to do so under a divorce decree, is not conclusively presumed to be dependent upon him for support, and since the child was living with an aunt, and the deceased with his second wife, who was not the mother of the child, no compensation was allowed the latter. ²¹

Where a husband and wife are living apart and the husband sends money for her support and maintenance of the home, there is a sufficient compliance with the provision of the statute providing that the wife shall be conclusively presumed to be totally dependent upon her husband, with whom she lives at the time of his death. ²²

Where a woman's husband is living and capable of supporting

18. *Bell City Malleable Iron Co. v. Indus. Comm. of Wis.*, 170 Wis. 293, (1919), 174 N. W. 899, 5 W. C. L. J. 333; *Holmberg's Case*, 231 Mass. 144, 120 N. E. 353, 2 W. C. L. J. 899.

19. *Doherty v. Grosse Isle Twp.* 205 Mich. 592, 172 N. W. 596, 4 W. C. L. J. 222; *East St. Louis Bd. of Education v. Indus. Comm.*,—Ill.,—(1921), 131 N. E. 123.

20. *Scott's Case*, 117 Me. 436, 104 Atl. 794, 3 W. C. L. J. 49.

21. *Schwartz v. Gerding & Aumann Bros.*,—Ind. App.,—, 121 N. E. 89, 3 W. C. L. J. 282; *In re Bentley*, 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559.

22. *Muncie Foundry & Machine Co. v. Coffee*, 64 Ind. App.,—, 117 N. E. 524, 1 W. C. L. J. 78, 16 N. C. C. A. 82.

her, there is no presumption that she is dependent upon her married son, even though he makes contributions to her.²³

Where deceased's wife is an alien, living apart from him and in a foreign country, she is not entitled to the benefit of a presumption that a wife living apart from her husband by agreement, to allow the husband to earn wages for support, is considered living with the husband, for the purpose of obtaining the benefit of the presumption, her dependency being a question of fact.²⁴

The Supreme Court of Minnesota, discussing in a recent case the question of conclusive presumption of dependency, said: "The Legislature in declaring that a particular fact shall be conclusively presumed does not establish a presumption in the ordinary sense of the term, but rather a rule of law to the effect that in the case specified the non-existence of the fact presumed is immaterial. 9 Ency. of Ev. 884; 2 Wigmore, Ev. Sec. 1353. The Legislature can make a presumption conclusive unless such presumption would cut off or impair some right given and protected by the Constitution. No provision of the Constitution is cited which takes from the Legislature the power to define and prescribe the duties of the husband to his wife and children and the rights to which the wife shall be entitled in consequence of the existence of the marriage status: and we are satisfied that the Legislature had power to provide that for the purposes of the compensation law the wife 'shall be conclusively presumed to be wholly dependent' upon her husband regardless of whether she had or had not been supported by him in his lifetime. The duty to support her rested upon him as a continuing obligation which could have been enforced at any time. The Legislature could recognize the existence of this obligation, and in the plenitude of its power could make such reasonable provision for the wife under the compensation

23. *Birmingham v. Westinghouse Electric & Mfg. Co.*, 167 N. Y. S. 520, 1 W. C. L. J. 241, 16 N. C. C. A. 179.

24. *In re McDonald*, 229 Mass. 445, 118 N. E. 949, 1 W. C. L. J. 805, 16 N. C. C. A. 87-214; *In re Derinza*, 229 Mass. 435, 118 N. E. 942, 1 W. C. L. J. 795, 16 N. C. C. A. 87; *In re Mooradjian*, 229 Mass. 521, 118 N. E. 951, 1 W. C. L. J. 812, 16 N. C. C. A. 215, 920; *Kalcic v. Newport Mining Co.*, 197 Mich. 364, 163 N. W. 962, 16 N. C. C. A. 211; *In re Gorski*, 227 Mass. 456, 116 N. E. 811, 16 N. C. C. A. 217.

law as it deemed just and proper. Furthermore even if the constitutional guaranties would be infringed by making the presumption conclusive in other cases, they would not be infringed by making it conclusive under the compensation law for the provisions of that law are obligatory only upon those who elect to become subject to it, and those who voluntarily assume the liabilities imposed by the law in order to secure the benefits conferred by it have been deprived of no constitutional right. *Matheson v. Minneapolis Street Ry. Co.*, 126 Minn. 286, 148 N. W. 71, L. R. A. 1916D, 412; *State ex rel. v. District Court*, 166 N. W. 185. This same provision was involved in *State ex rel. v. District Court*, 137 Minn. 283 163 N. W. 509, but its validity was not challenged. Similar provisions are found in the statutes of several states and their validity seems not to have been questioned. *Nelson's Case*, 217 Mass. 467, 105 N. E. 357; *Finn v. Detroit, Mt. C. & M. C. Ry. Co.*, 190 Mich. 112, 155 N. W. 721, L. R. A. 1916C. 1142; *Northwestern Iron Co. v. Industrial Commission* 154, Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877.²⁵

A father who is totally dependent upon his minor son is entitled to compensation, though the father's wife is living with him at the time of the accident, since the statutory presumption, that a husband is conclusively presumed to be dependent upon the wife with whom he is living does, not arise until she is injured.²⁶

Under the New Jersey Act, illegitimate children forming a part of deceased's household at the time of his death are presumed to be dependent. •An illegitimate posthumous child is held to form part of deceased's household and to fall within the statutory presumption.²⁷

25. *State ex rel. London & Lancashire Indemnity Co. v. District Court of Hennepin County*, 139 Minn. 409, 166 N. W. 772, 1 N. C. L. J. 835, 16 N. C. C. A. 78.

26. *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025, 13 N. C. C. A. 315.

27. *Klimchak v. Ingersoll Rand Co.*, 39 N. J. L. J. 275, 13 N. C. C. A. 274.

A wife living apart from her husband in the belief that in so doing a reconciliation would be effected, but with no definite agreement that they should again resume marital relations, supporting herself, though the husband sent money at times, could not be said to come within the statutory presumption as to total dependency of a wife living with her husband, even though she returned in response to a telegram at the time of his injury and spent the last hour or two with him at the hospital before he died.²⁸

It is held under the Massachusetts Act that a wife living apart from her husband is not entitled to the conclusive presumption of dependency, but whether or not she is dependent is a question of fact.²⁹

Under the same Act a child under the age of 18 is presumed dependent upon the parent with whom he is living at the time of such parent's death, "there being no surviving dependent parent," and the presumption is conclusive, conditioned upon the non existence of a surviving dependent parent.³⁰

The relation of husband and wife, having once existed, is presumed to continue.³¹

Where a statute provides compensation to parties conclusively presumed to be dependent, further compensation may be awarded to such presumptive dependents even after the period of presumptive dependency expires, if there remains a condition of actual dependency, such as daughters over the age of 18 actually dependent upon a parent, on account of being physically or mentally incapacitated from earning.³²

28. *Finn v. Detroit, Mount Clemens & Marine City Ry.*, 190 Mich. 112, 155 N. W. 721, 13 N. C. C. A. 187.

29. *In re Gallagher*, 219 Mass. 140, 106 N. E. 558, 9 N. C. C. A. 586; *In re Nelson*, 217 Mass. 467, 5 N. C. C. A. 694; *In re Bentley*, 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559.

30. *In re McNicol*, 215 Mass. 497, 102 N. E. 697, 4 N. C. C. A. 522.

31. *State ex rel. Coffey v. Chittendend*, 112 Wis. 569, 88 N. W. 587.

32. *In re Herrick*, 217 Mass. 111, 104 N. E. 432, 4 N. C. C. A. 554; *Peabody Coal Co. v. Ind. Bd.*, 281 Ill. 579, 117 N. E. 983, 1 W. C. I., J. 524, 16 N. C. C. A. 143; *State ex rel. Maryland Cas. Co. v. District Court of Ramsey Co.*, 134 Minn. 131, 158 N. W. 798, 13 N. C. C. A. 263; *In re Carter* 221 Mass. 105, 108 N. E. 911. *Nebr.* 1921 Am. 3665 § 111.

Under the Massachusetts Act, when there is a widow and a child under the age of 18 years, the widow is presumed to be entirely dependent and the compensation should be paid exclusively to her, though the act now reads; "to the wife or husband for her or his own use and for the benefit of her or his own children."³³

A child by a former wife is presumed to be equally dependent with a surviving wife, and shares benefits equally with such widow, even though there are several children by the surviving widow. But the Massachusetts Act was later amended to read as follows: "The death benefit shall be divided between the surviving wife or husband and all the children of the deceased employee in equal shares, the surviving wife or husband taking the same share as a child."³⁴

The conclusive presumption that certain children are dependent upon the father does not preclude proof of actual dependency upon the mother, and upon a finding of dependency upon the mother compensation will be allowed for the death of the mother even though the father is living.³⁵

There is no presumption that parents are dependent upon their children and the burden of proving the dependency rests upon the claimant.³⁶

Where the mother had been given custody of a minor son in divorce proceedings and upon her death the father voluntarily resumed the responsibility of supporting the child, the boy was dependent upon him even though at the time of the death he was working for a third person for his board.³⁷

§ 369. **Wife Living Apart from Husband.**—A wife living with her son temporarily according to an agreement between her de-

33. *In re Employer's Liab. Assur. Corp, McNicol, and Patterson*, 102 N. E. 697, 215 Mass. 497, 4 N. C. C. A. 522.

34. *Coakley v. Coakley*, 102 N. E. 930, 216 Mass. 71, 4 N. C. C. A. 508. Note: For question of husband and wife living apart, see section 369.

35. *Johnson Coffee Co. v. McDonald*, — Tenn. —, (1926), 226 S. W. 215.

36. *Milwaukee Basket Co. v. Indus. Comm.* —, Wis. —, (1921), 181 N. W. 308.

37. *Pac. Gold Dredging Co. v. Indus. Comm.*, — Cal. —, (1920), 194 Pac. 1, 7 W. C. L. J. 266.

ceased husband and herself, on account of her ill health, was living with her husband at the time of his death within the meaning of the compensation act.³⁸

When the statute provides that a wife shall be conclusively presumed to be dependent upon her husband "with whom she lives," and contains no provision that such presumption shall obtain when the wife is living apart from her husband, the question of her dependency upon him is one of fact. The words "with whom she lives" have been held to mean that husband and wife are living together as husband and wife in the ordinary acceptation and significance of these words in common understanding; that they are maintaining a home and living together in the same household, or actually cohabiting under conditions which would be regarded as constituting a family relation.³⁹

A broader view of the meaning of these words has been taken, however, and one more consistent with reason. This view holds the question to be largely one of intention, like the question of one's domicile.⁴⁰

Accordingly it does not turn upon time or distance separating the parties, but upon the nature and character of the absence and the intention of the parties respecting it. Where there is no legal separation and no actual separation in the nature of an estrangement, the husband and wife are "living together," although they may not be physically dwelling together, and in such case the wife is entitled to the benefit of the statutory provision creating a conclusive presumption as to her dependency.⁴¹

38. *Bell City Malleable Iron Co. v. Rowland*, 170 Wis. 293, (1919). 174 N. W. 899, 5 W. C. L. J. 333; *N. W. Iron Co. v. Indus. Comm.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877.

39. *Gallagher's Case*, 219 Mass. 140, 106 N. E. 558; *Nelson's Case*, 217 Mass. 467, 105 N. E. 357; *State ex rel. Kille v. District Court*, — Minn. —, (1920), 177 N. W. 934, 6 W. C. L. J. 344.

40. *Williams v. Williams*, 122 Wis. 27, 99 N. W. 431; *Thompson v. Thompson*, 53 Wis. 153, 10 N. W. 166; *Miller v. Sovereign C. W. of W.*, 140 Wis. 505, 122 N. W. 1126, 28 L. R. A. (N. S.) 178, 133 Am. St. Rep. 1095.

41. *Northwestern Iron Co. v. Industrial Comm.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916 A. 366, Ann. Cas. 1915, B. 877.

"This seems to be the reasonable and practical construction of the law, and the one which we think the legislature intended. If the law should receive the construction that there must be physical dwelling together in order to satisfy the statute, it is plain that the purpose of the law would in many cases be defeated, because in many cases the spouse may be absent from home for long intervals, although there be no break in the marriage relation, no estrangement, and no intent to separate or sever the existing relation or change the relations or obligations created by the marriage contract."⁴²

The question of whether or not the husband and wife were living together is, of course, one of fact; but when they are found to have been living together, the presumption of dependency is one of law. To justify a finding that husband and wife are not living together, there must be an intentional or permanent separation or estrangement; and temporary absence, such as is necessitated by employment, visits, or conveniences, do not suffice.⁴³

A wife living apart from her husband by agreement and not receiving her support from him, is not a dependent within the meaning of the act.⁴⁴

The same is true of a wife living apart from her husband, suing for divorce, and seeking no support from him.⁴⁵

42. *Northwestern Iron Co. v. Industrial Comm.* 154 Wis. 97, 102, 142 N. W. 217, L. R. A. 1916 A, 366, Ann. Cas. 1915 B, 877.

43. *W. Baird & Co. v. Padolska*, 8 F. 438, 43 Sc. L. R. 300, 6 N. C. C. A. 251; *State Comp. Ind. Fund v. Breslow*, 1 Cal. I. A. C. B. No. 12, 6 N. C. C. A. 251; *Queen v. Clark*, (1906), 2 I. R. 135, 40 I. R. L. T. 19, 6 N. C. C. A. 251; *Coulthard v. Consett Iron Co.*, 8 W. C. C. 87; *Nevadjic v. Northwestern Iron Co.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916 A, 366, Ann. Cas. 1915 B, 877; *Morris v. Yough Coal and Supply Co.* — Pa. —, (1920), 109 Atl. 914, 6 W. C. L. J. 210.

44. *Burdick v. Grand Trunk Ry. System*, — Mich. —, (1919), 175 N. W. 132, 5 W. C. L. J. 266; *Sweet v. Sherwood Ice Co.*, 40 R. I. 203, 100 Atl. 316, 16 N. C. C. A. 84; *McInroy v. M'Glashen & Son, Ltd.*, (1908), Sc. 762, 1 B. W. C. C. 85, 6 N. C. C. A. 248; *Polled v. G. N. R. Co.*, (1912), W. C. & Ins. Rep. 379, 6 N. C. C. A. 248; *Lee v. Bessie*, (1912), 1 K. B. 85, 5 W. C. C. 55, 6 N. C. C. A. 249; *Turners Ltd. v. Gillies*, 41 Sc. L. R. 631, 6 N. C. C. A. 249.

45. *Perry v. Industrial Acc. Comm.*, 176 Cal. 706, 169 Pac. 353, 1 W. C. L. J. 474, 16, N. C. C. A. 83.

On the other hand, where a wife is justified in living apart from her husband, it is held that she is not precluded from the benefits of the presumption of dependency.⁴⁶ And such justification is established when the husband is shown to be living in adultery with another woman.⁴⁷

In Massachusetts, however, it has been held that although a wife is justified in living away from her husband, the fact that they are not living together destroys the presumption of her dependency, which is then a question of fact.⁴⁸ The Massachusetts Act has been amended, and now there is a conclusive presumption of dependency of the wife who has been deserted by her husband or who is living apart from him for justifiable cause.

Evidence of an actual separation in the nature of an estrangement for more than a year and a half, is sufficient to support a finding that the parties were not living together as husband and wife, within the meaning of the act.⁴⁹

Contrary to the above, it is held in Illinois that a wife living apart from her husband and not actually dependent upon him, is entitled to be considered a dependent, if the husband is under a legal obligation to support her.⁵⁰

Where a husband and wife are living apart and he sends money for her support and the maintenance of their family home there is a sufficient compliance with the provision of the act

46. *State ex rel. v. District Court of Hennepin County*, 139 Minn. 409, 166 N. W. 772, 1 W. C. L. J. 836, 16 N. C. C. A. 80; *State ex rel. Grant Const. Co. v. Dist. Ct. of Ramsey County*, 137 Minn. 283, 163 N. W. 509.

47. *H. G. Goelitz Co. v. Industrial Board*, 278 Ill. 164, 115 N. E. 855, 16 N. C. C. A. 80.

48. *In re Gallagher*, 219 Mass. 140, 9 N. C. C. A. 586; *In re Nelson*, 217 Mass. 467, 5 N. C. C. A. 694; *In re Bentley*, 217 Mass. 79, 4 N. C. C. A. 559; *In re Newman*, 222 Mass. 563, 111 N. E. 369, L. R. A. 1916C, 1145; *In re Fierro's Case*, 222 Mass. 378, 111 N. E. 957.

49. *Smith v. Scheiddeger*, 170 Wis. 162, (1919), 174 N. W. 462, 5 W. C. L. J. 123.

50. *American Milling Co. v. Indus. Bd. of Ill.* 278, Ill. 560, 117 N. E. 147, 16 N. C. C. A. 86; *Goelitz Co. v. Indus. Bd.*, 278 Ill. 164, 115 N. E. 855, 16 N. C. C. A. 80; *Smith-Lohr Coal Mining Co. v. Indus. Comm.*, 286 Ill. 34, 121 N. E. 231, 3 W. C. L. J. 250; *Cunningham v. McGregor*, 38 S. L. R. 574; *Atlanta R. R. v. Gravitt*, 26 L. R. A. 553.

requiring husband and wife to be living together in order to create a conclusive presumption of dependency.⁵¹

In a case in which the wife denied the allegations of her deceased husband's divorce petition to the effect that she drove him from their home, the court said: "The fact that parties thus situated live separate and apart from each other might, standing alone, give rise to an inference that it was voluntary on the part of each. But any such inference is sufficiently rebutted in this case. 'It may be remarked in passing that the expression 'voluntarily living apart from her husband,' as used in this statute (Minn. Gen. St. 1913, Sec. 8208, as amended by chapter 209, Laws of 1915), means, and should be construed to mean, the free and intentional act of the wife uninfluenced by extraneous causes, or as it might be otherwise expressed, her choice deliberately made and acted upon."⁵²

Where a wife left her husband six months before the occurrence of an accident, resulting in his death, had supported herself, though the husband had sent her some money during this time, and she returned, in response to a telegram from his employer's claim agent, and stayed with her husband at the hospital for an hour or two until he died, she is not to be conclusively presumed to be totally dependent upon her husband, though she testified that she separated from her husband because of differences of religious faith, etc., and in the belief that her doing so would eventually result in their reconciliation.⁵³

An insane wife cared for by the state for nine years is not a dependent, for a wife living apart from her husband must be actually dependent upon and receiving support from her husband at the time of his death.⁵⁴

51. *Muncie Foundry & Machine Co. v. Coffee*, 64 Ind. App. —, 117 N. E. 524, 1 W. C. L. J. 78, 16 N. C. C. A. 82; *Coletrane v. Ott*, — W. Va. —, (1920), 103 S. E. 102, 6 W. C. L. J. 232.

52. *State ex rel. Geo. J. Grant Const. Co. v. District Court of Ramsey County*, 137 Minn. 283, 163 N. W. 509, 16 N. C. C. A. 79.

53. *Finn v. Detroit, Mount Clemens & Marine City Ry.*, 190 Mich. 112, 155 N. W. 721, 13 N. C. C. A. 187.

54. *Roberts v. Whaley*, 192 Mich. 133, 158 N. W. 209, 13 N. C. C. A. 189; *Berlin v. Chesky*, — Wis. Ind. Comm. —, 6 N. C. C. A. 269.

Where the deceased left his wife and refused to support her, whereby she was compelled to rely upon her step sons for support, the court, in holding that she was entitled to compensation, said: "The mere fact that one of the parties to a marriage contract desires to break the contract and neglect his duties under the same does not release him from those duties and obligations, unless the other party to the contract consents to the same and waives her rights under the said contract of marriage."⁵⁵

A wife living apart from her husband, because the husband was unable to earn sufficient to have a home, may be dependent upon him if he actually contributes to her support.⁵⁶

Under the New Jersey and English Acts a wife living apart from her husband for justifiable cause and not relinquishing her claim upon him for support, but seeking to enforce it through processes of court is dependent upon the husband, despite the fact that at the time of his death he was evading an order of the court to support his wife and child and the widow was supporting herself and child.⁵⁷ But in the New Monckton Collieries case the court held that there was conclusive evidence that the applicant was in fact not a dependent upon her husband's earnings nor in any way claiming the fulfillment of his duty towards her. The fact that a husband is liable for the support of his wife in law is not of itself sufficient evidence to support a claim for compensation by the widow. "Money coming to a widow under the act is not a present in consideration of her status; it is a payment by a third person to compensate her, as a dependent, for her actual pecuniary loss by her husband's death, and * * * there is no rule of law to prevent the arbitrator from finding that, though

55. *McHugh v. E. J. Dupont, De Nemours & Co.*, 39 N. J. L. J. 153, 13 N. C. C. A. 193.

56. *Veber v. Mass. Bonding & Ins. Co.*, 224 Mass. 86, 112 N. E. 485, 13 N. C. C. A. 196; *In re Newman*, 222 Mass. 563, 111 N. E. 359, 13 N. C. C. A. 197; *Morris v. Yough Coal and Supply Co.*, — Pa. —, (1920), 109 Atl. 914, 6 W. C. L. J. 210.

57. *Young v. Niddrie & Benhar Coal Co.*, (1913), 6 B. W. C. C. 774; *Medler v. Medler*, (1908), 1 B. W. C. C. 332; *Mees v. P. Ballantine & Sons Inc.*, 37 N. J. L. 111, 9 N. C. C. A. 587; *New Monckton Collieries, Ltd. v. Keeling*, (1911), A. C. 648, 6 N. C. C. A. 240, 105 L. T. 337, 4 B. W. C. C. 332, 27 T. L. Rep. 551.

married to the deceased, the applicant was not in fact dependent upon him."

Where a husband and wife lived together only occasionally and for short periods, and the husband paid the doctor's and grocer's bills, bought clothes for his child and gave money to his wife, who was also earning money, it was held that it was a question of fact for the industrial commission to determine whether the wife was living apart from her husband for a justifiable cause.⁵⁸

And a wife living apart from her husband because at the time of the separation he was not able to support her, but at the time of his death he was able to support her, is not living apart for justifiable cause.⁵⁹

Where a husband upon leaving an insane asylum, had gone to reside some distance from his wife, it was held that in view of the fact that the husband had, upon previous occasions, shown antipathy towards his wife, she was justified in living apart from him until he, at least had shown some inclination to have her reside with him.⁶⁰

The fact that a husband, who was living apart from his wife, contracted a bigamous marriage, will not, of itself, defeat his widow's right to compensation.⁶¹

§ 370. Dependency and Matters Related Thereto Questions of Law or of Fact.—Dependency, its extent, and persons entitled to compensation, are questions of fact for the industrial commission to determine in all cases, other than the cases of those persons conclusively presumed to be dependent.⁶² and unless the commission

58. *Veber v. Massachusetts Bonding & Ins. Co.*, 224 Mass. 86, 112 N. E. 485.

59. *In re Newman's Case*, 111 N. E. 359, 222 Mass. 563.

60. *Gates v. A. G. Dewey Co.*, — Vt. —, (1920), 111 Atl. 446, 6 W. C. L. J. 719.

61. *Coletrane v. Ott.* — W. Va. —, (1920), 103 S. E. 102, 6 W. C. L. J. 232.

62. *Keller v. Indus. Comm.*, 291 Ill. 314, (1920), 126 N. E. 162, 5 W. C. L. J. 665; *Rock Island Bridge & Iron Works v. Indus. Comm.*, 287 Ill. 648, 122 N. E. 830, 4 W. C. L. J. 33; *O'Flynn's Case*, 232 Mass. 582, (1919), 122 N. E. 767, 4 W. C. L. J. 105; *Perotti's Case*, 233 Mass. 297, (1919), 123 N. E. 776, 4 W. C. L. J. 391; *Hodgson v. West Stanely Col.*

has applied an illegal standard, or found a fact without evidence to support it, the court cannot review its finding.⁶³

On appeal, the question whether there was any evidence to support the finding of the board or commission, is one of law.⁶⁴

"There has been a good deal of divergence in judicial opinion as to what dependency means. There has been a disposition to draw highly refined distinctions, and the decisions arrived at and the reasons for them have not always been consistent. I think that this

Hery, 3 B. W. C. C. 260, 6 N. C. C. A. 285; *Fennimore v. Pittsburg Scammon Coal Co.*, 100 Kan. 272, 164 Pac. 265, 16 N. C. C. A. 176; *Garcia v. Indus. Comm.*, 171 Cal. 57, 151 Pac. 741, 13 N. C. C. A. 316; *Simmons v. White Bros. Co.*, (1899), 1 Q. B. 1005, 6 N. C. C. A. 285; *Tamworth Colliery Co. v. Hall*, (1912), W. C. & Ins. Rep. 79, 6 N. C. C. A. 285; *In re Herrick*, 217 Mass. 111, 104 N. E. 432; *In re Newman's Case*, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916 C, 1145; *Bartley v. Boston & N. St. Ry.*, 198 Mass. 163, 83 N. E. 1093; *Potts v. Niddrie & Benhar Coal Co.*, (1913), A. C. 531; *Petrozino v. Amer. Mut. Liab. Co.*, 219 Mass. 498, 107 N. E. 370; *Miller v. Public Service Ry. Co.*, 84 N. J. Law, 174, 85 Atl. 1030; *Appeal of Hotel Bond Co.*, 89 Conn., 143, 93 Atl. 245; *Main Colliery Co., Ltd., v. Davies*, 16 T. T. 460; *Houlihan v. Connecticut River R. R.*, 164 Mass. 555, 42 N. E. 108; *American Legion of Honor v. Perry*, 140 Mass. 580, 5 N. E. 634; *Miller v. Riverside Storage Co.*, 189 Mich. 360, 155 N. W. 462; *State ex rel. Globe Indemnity Co. v. District Court*, 132 Minn., 249, 156 N. W. 120; *Muzik v. Erie R. Co.*, 85 N. J. Law, 131, 89 Atl. 248, 86 N. J. Law, 695, 92 Atl. 1087; *Havey v. Erie R. Co.*, 88 N. J. Law, 684, 96 Atl. 995; *Walz v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, 155 N. Y. Supp. 703; *Rockford Cabinet Co. v. Indus. Comm.*, — Ill. —, (1920), 129 N. E. 142, 7 W. C. L. J. 280; *Day v. Sioux Falls Fruit Co.*, — S. Dak. —, (1920), 177 N. W. 816, W. C. L. J. 216; *Southern Surety Co. v. Hibbs*, — Tex. Civ. App. —, (1920), 221 S. W. 303, 6 W. C. L. J. 225; *MacDonald v. Employers Ass'n. Liab. Corp.*, — Me. —, (1921), 112 Atl. 719.

63. *McDonald v. Great Atlantic & Pacific Tea Co.*, — Conn. —, (1920), 111 Atl. 65, 6 W. C. L. J. 525; *McVicar v. Indus. Comm. of Utah*, — Utah —, (1920), 191 Pac. 1089, 6 W. C. L. J. 596; *Geo. A. Lowe v. Indus. Comm. of Utah*, — Utah —, 190 Pac. 934; *Alden Coal Co. v. Indus. Comm.*, — Ill. —, (1920, 127 N. E. 341, 6 W. C. L. J. 274; *Henry Pratt Co. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 754, 6 W. C. L. J. 296; *Globe Grain & Milling Co. v. Indus. Comm.*, — Utah —, (1920), 193 Pac. 642, 7 W. C. L. J. 245.

64. *In re Herrick*, 217 Mass. 111, 104 N. E. 433, 4 N. C. C. A. 554; *Hoff v. Hackett*, 148 Wis. 32, 134 N. W. 132; *Northwestern Iron Co. v. Industrial Comm.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916 A 366; *Hancock*

tendency and its consequences will be lessened if it is borne firmly in mind that the question is always primarily one of fact.⁶⁵

Whether a widow and deceased husband were living together at the time of the injury is a question of fact.⁶⁶

Expenses incurred on account of a deceased minor son are pertinent in determining dependency, but immaterial in ascertaining the amount of compensation when dependency is established. And the question of dependency is to be determined on conditions existing at the time of the injury.⁶⁷

"It is clear from this section of the act that the widow is conclusively presumed to be wholly dependent. It is equally clear that the daughter, who is 13 years of age, is not conclusively presumed to be wholly dependent, because it appears that she was not living with her father at the time of his death. So that, if the daughter is entitled to compensation, it must be because she is shown to be wholly dependent on the decedent under that portion of said act which provides: 'In all other cases the question of dependency in whole or in part shall be determined in accordance with the fact, as the fact may be at the time of the injury.' While it may be conceded, as contended by appellant, that there was a legal as well as a moral obligation resting upon decedent to support his daughter, yet the question of dependency, in cases such as this, is not to be determined upon such obligations, although they are to be taken in-

et al. v. Indus. Comm., — Utah —, (1921), 198 Pac. 169.

65. Young v. Niddrie & B. Coal Co., 29 T. L. Rep. 626, 6 B. W. C. C. 774, 82 L. J. P. C. 147. Morris v. Yough Coal & Supply Co. — Pa. —, (1920), 109 Atl. 914, 6 W. C. L. J. 210.

66. Smith v. Indus. Comm., 170 Wis. 162, (1919), 174 N. W. 462, 5 W. C. L. J. 123, 174 N. W. 462; Iron Co. v. Indus. Comm., 154 Wis. 97 142 N. W. 271, 3 N. C. C. A. 670; In re Nelson, 217 Mass. 467, 105 N. E. 357, 5 N. C. C. A. 694; Taylor v. Seabrook, 87 N. J. L. 407, 94 Atl. 399; Travelers Ins. Co. v. Hallauer, 131 Wis. 371, 111 N. W. 527.

67. Freeman's Case, 233 Mass. 287, (1919), 123 N. E. 845, 4 W. C. L. J. 498; Mulraney v. Brooklyn Rapid Transit Co., 180 N. Y. S. 654, 5 W. C. L. J. 731; Botts Case, 230 Mass. 152, 119 N. E. 755; Kenney's Case, 222 Mass. 401, 111 N. E. 47; Pinel v. Rapid R. System, 184 Mich. 169, 150 N. W. 879; Blanton v. Wheeler, etc., Co., 91 Conn. 226, 99 Atl. 494; Birmingham v. Electric, etc., Co., 180 App. Div. 48. 167 N. Y. Supp. 520; Dazy v. Apponaug Co., 36 R. I. 81, 89 Atl. 160.

to consideration when the question of dependency is to be determined as a matter of fact. Also, the fact that decedent was ordered, in the divorce proceeding referred to, to pay \$8 per month for the support of his child, may be taken into account to determine the existence of the ultimate fact of dependency. Likewise, whether there is any probability that such order would be discharged either voluntarily or by proper legal proceedings, or the probability that the daughter would ever seek to enforce her rights under the order, if the requirements thereof were not voluntarily complied with, are matters which would be proper for the Industrial Board to consider in connection with all other competent evidence to aid them in determining the question of fact whether or not appellant at the time of her father's injury, resulting in his death, depended upon his wages for her support in whole or in part.⁶⁹

"While the question of dependency may involve principles of law, the fact remains that dependency is a question of fact to be determined from all the circumstances of the case, and the burden of proving it rests upon him who claims it."⁶⁹

The dependency of an alien wife is a question of fact;⁷⁰ and so is the dependency of a wife living apart from her husband.⁷¹

The question of what disposition of compensation for the death of an employee is in proportion to the respective needs of the dependents and just and equitable, even to the total exclusion of one or more of them, is one of fact for the industrial commission.⁷²

68. *Schwartz v. Gerding & Auman Bros.*,—Ind. App.—, 121 N. E. 89, 2 W. C. L. J. 282.

69. *Benjamin F. Shaw Co. v. Palmatory*, — Delaware —, (1919), 105 Atl. 417, 3 W. C. L. J. 424; *Miller v. Public Service R. Co.* 84 N. J. L. 174, 85 Atl. 1030, 3 N. C. C. A. 593; *Muzik v. Erie R. Co.*, 85 N. J. L. 129, 89 Atl. 248, 4 N. C. C. A. 732, 86 N. J. L. 695.

70. In re *McDonald*, 229 Mass. 454, 118 N. E. 949, 1 W. C. L. J. 808, 16 N. C. C. A. 87, 214; In re *Derinza*, 229 Mass. 435, 118 N. E. 942, 1 W. C. L. J. 795, 16 N. C. C. A. 87; In re *Mooradjian*, 229 Mass. 521, 118 N. E. 951, 16 N. C. C. A. 215, 920; In re *Fierro's Case*, 222 Mass. 378, 111 N. E. 958, 13 N. C. C. A. 544.

71. In re *Bentley*, 217 Mass. 79, 4 N. C. C. A. 559, 104 N. E. 432.

72. *Perry v. Indus. Acc. Comm.*, 176 Cal. 709, 169 Pac. 353, 1 W. C. L. J. 474, 16 N. C. C. A. 83.

A parent may be dependent upon his son for support under some circumstances, but the court is not required to hold as a matter of law that he is so dependent simply because he receives money from his son and spends it.⁷³

In a proceeding for compensation by a widow, it appeared that the deceased left a father, brothers and sister. No proof of actual dependency of the father, brothers or sister was made, and the court held that in the absence of such proof no increase in the award could be made, for there was no presumption of their dependency.⁷⁴

Where the contributions of the deceased to his dependents have not been constant, either as to time of payment or amounts, the determination of what that amount is during the year preceeding death, rests in the sound discretion of the commission, based on the evidence.⁷⁵

The existence of a common-law marriage is a question of fact and the boards finding is conclusive, and where the evidence was not clear and convincing upon this point, the Board's finding was justified, and the illegitimate son of the deceased is not entitled to compensation under the Michigan Act.⁷⁶

§ 371. **Partial Dependents.**—The term "actual dependents," as used in the acts, has been construed to mean dependents in fact, whether wholly or partially dependent.⁷⁷ And a person may be partially dependent even though the contributions be at irregular intervals or in irregular amounts, and though the dependent has other means of support,⁷⁸ and is not in a position of absolute

73. *Main Colliery Co. v. Davies* (1900), A. C. 358, 6 N. C. C. A. 243, 2 W. C. C. 108, 83 L. T. 83, 16 T. L. Rep. 46, 69 L. J. Q. B. 755.

74. *Miller v. Public Service R. R. Co.*, 84 N. J. L. 174, 3 N. C. C. A. 593, 85 Atl. 1031.

75. *Popst v. Industrial Accident C. of Cal.*, — Cal. —, 192 Pac. 296, 6 W. C. L. J. 643.

76. *Brown v. Long Mfg. Co.*, — Mich. —, (1921), 182 N. W. 124.

77. *Muzik v. Erie Ry. Co.*, 86 N. J. L. 695, 92 Atl. 1087, Ann. Cas. 1916A 140; *Jackson v. Erie Ry. Co.*, 86 N. J. L. 550, 91 Atl. 1035; *Hammill v. Penn. R. Co.*, 87 N. J. L. 388, 94 Atl. 313; *Havey v. Erie Ry. Co.*, 87 N. J. L. 444, 95 Atl. 124; *Miller v. Pub. Serv. Ry. Co.*, 84 N. J. L. 174, 85 Atl. 1030; *Arrol & Co. v. Kelly*, 7 F. 906, 42 S. C. L. 695.

78. *Keller v. Indus. Comm.*, 291 Ill. 314, (1920), 126 N. E. 162, 5 W. C.

want.⁷⁹ Partial dependency is based upon the actual contributions to the support of the party, and not upon contributions for purposes other than support.⁸⁰

The fact that the contributions received were not essential to the support of life does not bar the claimant as a partial dependent. The test that has been laid down is, whether such contributions were relied upon by him for his means of living according to his class and position in the community.⁸¹

This test may be applicable under some acts and not under others. The Connecticut Act makes the sole test one of dependency, while the English Act provides that in cases of partial dependency the amount recoverable shall be reasonable "and proportionate to the injury to the said dependents." Accordingly, under the latter Act, the question is whether the claimant has suffered financial injury by reason of the death of the deceased. This is a very broad test, if a test at all, rather than an element only among

L. J. 665; *Rock Island Bridge & Iron Wks. v. Indus. Comm.*, 287 Ill. 648, (1919), 122 N. E. 830, 4 W. C. L. J. 33; *Walz v. Holbrook*, 170 App. Div. 6, 155 N. Y. S. 703; *Tierre v. Bush Terminal Co.*, 172 App. Div. 386, 158 N. Y. S. 883; *Rhyner v. Hueber Bldg. Co.*, 171 App. Div. 56, 156 N. Y. S. 903; *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916 A. 436; *Smith v. National Sash & Door Co.*, 96 Kan. 816, 153 Pac. 533; *Dodge v. Boston & Providence R.*, 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318; *Bentley v. Mass. Emp. Ins. Assn.*, 217 Mass. 79, 104 N. E. 423; *Krauss v. Geo. H. Fritz & Sons*, 87 N. J. L. 321, 13 N. C. C. A. 319; *Freeman's Case*, 233 Mass. 287, (1919), 123 N. E. 845, 4 W. C. L. J. 499; *Kenney v. City of Boston*, 222 Mass. 401, 111 N. E. 47; *Miller v. River Side Storage and Cartage Co.*, 189 Mich. 360, 155 N. W. 462.

79. *Rhyner v. Hueber Bldg. Co.*, 171 App. Div. 56, 156 N. Y. S. 903; *Walz v. Holbrook Cabot & Rollins Corp.*, 170 N. Y. App. Div. 6, 155 N. Y. S. 703.

80. *In re McMahon*, 229 Mass. 48, 118 N. E. 189, 16 N. C. C. A. 185; *Mulraney v. Brooklyn Rapid Transit Co.*, 190 N. Y. App. Div. 774, 180 N. Y. S. 654, 5 W. C. L. J. 731; *Dazy v. Apponaug Co.*, 36 R. I. 81, 4 N. C. C. A. 694, 89 Atl. 160; *MacDonald v. Employer's Assur. Liab. Corp.*, — Me. — (1921), 112 Atl. 719. But see *State ex rel. Fleckenstein Brg. Co. v. District Court of Rice Co.*, 134 Minn. 324, 159 N. W. 755, 16 N. C. C. A. 185. See 1921 Am. Me. Act (§ I [viii]).

81. *Powers v. Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245.

others to be found, and might be applied in all cases where claim is based on partial dependency; for, if the claimant has suffered no financial deprivation, then certainly he was not dependent. However, the contrary view has been taken in the case of a father who claimed compensation upon the death of his son, whom he supported; the court holding that it was not required to strike a balance between the son's earnings and the cost of his maintenance, with a view to ascertaining whether his death was a financial injury to the father.⁸²

In any view, the fact that the claimant can manage to exist without the contributions formerly received from the deceased, is in no sense decisive of the question of his dependency. Accordingly, a case of partial dependency was found, although the deceased was fatally injured before his first pay day.⁸³

A mother who receives contributions from a son for use in her support, is partially dependent upon the son for support even though she is living with her husband, if the husband is not sufficiently providing for her support. And a finding of partial dependency, whatever its degree, entitles the dependent in Illinois to at least the minimum award provided in the act.⁸⁴

Under the Kentucky Act a father partially dependent upon his son is entitled to his proportionate share of the death benefit, even though the deceased son left a totally dependent widow.⁸⁵

Evidence that a son's contribution of \$8 per week when working enabled the mother to run her house more easily than after she was deprived of her son's support, was held sufficient to constitute the mother a partial dependent, though her husband was alive and not incapacitated.⁸⁶

82. *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025.

83. *Freeman's Case*, 233 Mass. 287, (1919), 123 N. E. 845, 4 W. C. L. J. 499; *McMahon's Case*, 229 Mass. 48, 118 N. E. 189, 1 W. C. L. J. 387.

84. *Keller v. Indus. Comm.*, 291 Ill. 314, (1920), 126 N. E. 162, 5 W. C. L. J. 665; *Rock Island Bridge & Iron Works v. Indus. Comm.*, 287 Ill. 648, (1919), 122 N. E. 830; 4 W. C. L. J. 33; *Krauss v. Geo. H. Fritz & Son*, 87 N. J. L. 321, 93 Atl. 578, 13 N. C. C. A. 319.

85. *Penn v. Penn.*, 183 Ky. 228, (1919), 209 S. W. 53, 3 W. C. L. J. 634.

86. *Grant v. Kotwall*, — Md. —, (1919), 105 Atl. 758, 3 W. C. L. J. 735.

Where the deceased contributed weekly to the support of his mother and half-brothers and half-sisters, a finding that they were partially dependent upon him was justified by the evidence.⁸⁷

In a Kansas case the court said: "The question whether or not the plaintiffs were partially dependent on the earning of their son was a question of fact, and finding of the fact of partial dependency is conclusive on appeal if there be any evidence to support it. The statute is a blind guide to the determination of the question of fact. Dependents are said to be members of the workman's family who were dependent on him. The definition includes the term to be defined. Earnings of the workman come in as a factor of dependency in the provision relating to the amount of compensation to those who were wholly dependent. Injury comes in the provision relating to the amount of compensation to partial dependents. But there is no definite standard of dependency, either total or partial. Perhaps the legislature used the word 'dependent' in the dictionary sense of relying on the workman's earnings for support. Support for what? The bare necessities of life, without which existence would be impossible, or support according to some standard? If according to some standard, what standard? One to which the dependent was accustomed or one which the court might think reasonable under all the circumstances? * * * Accepting the statute just as it came from the legislature, the court is of the opinion that the question before the district court was not one of how the domestic economics of the Fennimore family might have been arranged, or ought to have been arranged, but how they were arranged; and if the father and mother did in fact depend in part upon the son's earnings, so that they suffered injury by being deprived of what they had relied upon they were entitled to recover. This being true, the finding of partial dependency is abundantly sustained."⁸⁸

Under the Indiana Act a mother who received contributions from a minor son together with contributions from her former hus-

87. *Bylow v. St. Regis Paper Co.*, 179 N. Y. App. Div. 555, 166 N. Y. E. 874, 16 N. C. C. A. 152.

88. *Fennimore v. Pittsburg-Scammon Coal Co.*, 100 Kan. 372, 164 Pac. 265, 16 N. C. C. A. 176.

band under a decree of divorce, is entitled to an award for partial dependency upon the death of her minor son.⁸⁹

Contemplated improvements on the father's house could not be considered in determining the amount payable to him as a partial dependent of his son.⁹⁰

There is no difference between the amount payable to parents, regardless of whether they are considered total or partial dependents, when the son turned over all his earnings to the family fund.⁹¹ In other cases of partial dependency the amount of compensation is to be measured by the actual "average amount contributed weekly" instead of the technical "Average weekly wage."⁹²

Where the deceased son turned all of his earnings into the family fund and in return received his clothes and spending money, the court held that the parents were partial dependents as they regularly derived part of their support from the wages of the deceased, and this despite the fact that the father was earning and the family were saving to pay off a mortgage on the home.⁹³

An unmarried sister, who received assistance from a brother during her pregnancy and after child birth until the brother was killed, was, in view of the fact that she would in all probability, need assistance in the future, entitled to compensation as a partial dependent, even though she was capable of partially providing for her needs.⁹⁴

An agreement between the deceased and a sister that she stay home and care for the family and that he would support her, is sufficient to constitute a basis for a finding of dependency; but

89. *Bloomington-Bedford Stone Co. v. Phillips*, 64 Ind. App. —, 116 N. E. 850, 16 N. C. C. A. 180.

90. *In re McMahon*, 229 Mass. 48, 118 N. E. 189, 16 N. C. C. A. 185.

91. *In re Peters*, 64 Ind. App. —, 116 N. E. 848; *Bloomington Bedford Stone Co. v. Phillips*, 64 Ind. App. —, 116 N. E. 850, 16 N. C. C. A. 185.

92. *Indian Creek Coal and Mining Co. v. Kutter*, — Ind. App. —, (1921), 131 N. E. 413.

93. *State ex rel. Ernest Fleckenstein Brewing Co. v. District Court of Rice County*, 134 Minn. 324, 159 N. W. 755, 16 N. C. C. A. 185.

94. *Jackson v. Indus. Comm. of Wis.*, 164 Wis. 94, 159 N. W. 561, 13 N. C. C. A. 458.

where the sister had other sources of income the finding must be of partial dependency.⁹⁵

A sister who was earning \$10.00 per week as a stenographer may be found to be partially dependent upon her deceased brother, when the brother had been actually lending assistance to her, for there is no standard as to just when a person can be said not to be in need of such support, in order that she could live in accordance with her position and rank in life.⁹⁶

Where a statute sets a minimum for partial dependents and not for total dependents, as in the Minnesota Act, it has been held that the same construction should be placed on both, and there should be no minimum amount which a partial dependent should receive. But the amendment of 1915 to the statute removed this difficulty.⁹⁷

Where deceased sent \$30.00 a month to his mother for the support of his crippled sister, but it appeared that the entire sum was not expended upon the sister, an award of partial dependency was sustained.⁹⁸

The fact that a parent was capable of self support does not preclude him from compensation as a partial dependent.⁹⁹

Under the Michigan Act, if the annual earnings of an employee do not exceed \$520.00, compensation should be awarded at the rate of \$5 per week for 300 weeks, in case of death.¹

The Minnesota Act provides that the amount paid to partial dependents shall be "that proportion of the benefits provided for actual dependents which the average amount of the wages regularly contributed by the deceased to such partial dependent at, and for

95. *Kenney v. City of Boston*, 222 Mass. 401, 111 N. E. 47, 13 N. C. C. A. 461.

96. *Miller v. Riverside Storage and Cartage Co.*, 189 Mich. 360, 155 N. W. 462, 13 N. C. C. A. 462.

97. *State ex rel. Globe Indemnity Co. v. District Court of Ramsey Co.*, 132 Minn. 249, 156 N. W. 120, 13 N. C. C. A. 463.

98. *Cheperton v. Oceanic S. N. Co.*, (1913), W. C. & Ins. Rep. 462, 6 N. C. C. A. 264.

99. *Howells v. Vivian & Sons*, (1901), 50 W. R. 163, 85 L. T. 529, 18 T. L. R. 36, 4 W. C. C. 106, 6 N. C. C. A. 274.

1. *De Mann v. Hydraulic Engineering Co.*, 192 Mich. 594, 195 N. W. 380.

a reasonable time prior to the injury, bore to the total income of the dependent during the same time."²

The minimum death benefit to be paid to partial dependents in Minnesota is \$6.00 per week.³

Under the Washington Act a dependent mother was held entitled to \$20.00 per month as long as the dependency lasted, and the provision of the act that in case of a minor's death compensation should continue for a time equal to the time when the minor would have become of age applies exclusively to cases where there were no dependents.⁴

Under the Wisconsin Act, in case of death the compensation cannot be decreased because the employee is over 55 years of age, as in the case of permanent disability.⁵

Under the Federal Act, which fixes compensation, of brothers and sisters, where there is one totally dependent, at 20 per cent, if more than one 30 per cent, share and share alike, and where there are none wholly dependent but one or more partially dependent, 10 per cent to be divided share and share alike, it was held that where there were several persons partially dependent that the commission might, in the exercise of its discretion, allow anywhere between 10 and 30 percent, for to do otherwise would not afford any appreciable amount to any one.⁶

It has been held that under the Connecticut Act "a partially dependent may receive any fractional part of the weekly compensation to be paid the wholly dependent; and under the maximum and minimum provision a sum in excess of the weekly aid received by the partially dependent from the employee may in some circumstances be awarded such dependent."⁷

2. State ex rel. Hayden v. District Court of St. Louis Co., 133 Minn. 454, 158 N. W. 792.

3. State v. District Court of Rice County, 134 Minn. 324, 159 N. W. 755.

4. Boyd v. Pratt, 72 Wash. 306,, 130 Pac. 371..

5. City of Milwaukee v. Ritzow, 158 Wis. 376, 149 N. W. 480, 7 N. C. C. A. 498.

6. In re John P. Murphy, 3rd A. R. U. S. C. C. 101.

7. Quilty v. Connecticut Co., — Conn. —, 113 Atl. 149 (1921).

§ 372. **Total Dependency.**—Total dependency exists where persons coming within the statutory classification of “who may be dependents” subsist entirely upon the earnings of the workman,⁸ irrespective of the fact that in the absence of the assistance such persons would be able to support themselves.⁹ It is immaterial that gratuitous contributions from persons other than the workmen are occasionally received,¹⁰ that they hold small savings accounts of their own,¹¹ that the moneys received from the workman were other than his earnings,¹² or were paid to others for the support of the one claiming dependency.¹³

On the other hand, the fact that a claimant has a substantial independent fund of his own, may reduce his dependency from whole to partial.¹⁴

Thus, where the claimant had \$600 in bank, and one-third interest in unincumbered productive real estate in Boston that was assessed for \$1300, her claim as one wholly dependent was

8. *Marsh v. Boden*, (1905), 7 W. C. C. 110 C. A.; *Simms v. Lilleshall Colliery Co. Ltd.*, 1917 W. C. & Ins. R. 218, 16 N. C. C. A. 147; *In re Yeople*, 182 N. Y. App. Div. 438, 169 N. Y. Supp. 584 Aff'd. 223 N. Y. —, 16 N. C. C. A. 149.

9. *Belle City Malleable Iron Co. v. Rowland*, 170 Wis. 293, (1919), 174 N. W. 899., 5 W. C. L. J. 333; *Simms v. Lilleshall Colliery Co. Ltd.*, (1917), W. C. & Ins. Rep. 218, 16 N. C. C. A. 147; *In re Herrick*, 217 Mass. 111, 104 N. E. 433, 4 N. C. C. A. 554; *Moyes v. Dixon Ltd.*, (1950), 7 F. 386.

10. *Petrozino v. American Mutual Liab. Co.*, 219 Mass. 498, 107 N. E. 370, 9 N. C. C. A. 594; *State ex rel. Splady v. District Court of Hennepin Co.*, 128 Minn. 338, 151 N. W. 123, 9 N. C. C. A. 580; *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436.

11. *In re Buckley* 218 Mass. 354, 105 N. E. 979, 5 N. C. C. A. 613; *In re Carter*, 221 Mass. 105, 108 N. E. 911, 9 N. C. C. A. 579; *Morris v. Yough Coal & Supply Co.*, 266 Pa. —, 109 Atl. 914, 6 W. C. L. J. 210 (1920).

12. *State ex rel. Crookston Lbr. Co. v. District Ct. Beltrami Co.* 131 Minn. 27, 13 N. C. C. A. 556, 154 N. W. 509.

13. *Walz v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, 155 Supp. 703; *O'Flynn's Case*, (1919), 232 Mass. 582, 122 N. E. Rep. 767, 4 W. C. L. J. 105.

14. *Dazy v. Apponaug Co.*, 36 R. I. 81, 89 Atl. 160, 4 N. C. C. A. 594.

disallowed, and she was allowed compensation on the basis of partial dependency only.¹⁵

Where the statute fixes the time for determining dependency as antecedent to the employee's death; that is, at the time of the injury, money or property coming to the claimant out of the deceased's estate cannot be considered in determining whether claimant was wholly or only partially dependent upon such employee.¹⁶

A wife living with a husband at and prior to the time of the injury is conclusively presumed to be totally dependent upon him, despite the fact that she had a separate income of her own.¹⁷

A claim of total dependency by a wife in Italy upon a husband in the United States cannot be sustained, where the evidence shows that the husband owned the house, the widow and family were living in, in Italy, without a further showing that the house was of no value.¹⁸

A grown daughter keeping house for her father and receiving her entire support from him, is totally dependent on the father, even though she is capable of earning her own living. The court said: "Under the Workmen's Compensation Act, 1906, it is clear that dependency has to be ascertained at the time of the death; and if the dependency is total, the learned judge as arbitrator has no discretion as to the amount of compensation to be awarded, but it is the amount of the workman's earnings during 3 years. If the dependency is partial, the whole thing is at large, and the arbitrator has to take all the circumstances into consideration and then say what was the proper amount of compensation. He is not tied down except that he cannot give more than a certain sum. He is not bound to give any particular sum. Here the learned

15. *Kenney v. City of Boston*, 222 Mass. 401, 111 N. E. 47.

16. *Kenney v. City of Boston*, 222 Mass. 401, 111 N. E. 47; *Pryce v. Penrikyber Nav. Col. Co.*, 85 L. T. 477, 4 W. C. C. 115, (1902), 1 K. B. 221, 71 L. J. K. B. 192, 50 W. R. 197, 66 J. P. 198.

17. *Belle City Malleable Iron Co. v. Rowland*, 170 Wis. 293, (1919), 174 N. W. 899, 5 W. C. L. J. 333.

18. *In re Derinza*, 229 Mass. 435, 118 N. E. 942, 1 W. C. L. J. 795, 16 N. C. C. A. 210; *In re McDonald*, 229 Mass. 454, 118 N. E. 949, 1 W. C. L. J. 808, 16 N. C. C. A. 87, 214.

judge has taken the view that he must see whether this applicant was physically incompetent to earn wages, in order to ascertain whether she was totally dependent on her father. This is plainly wrong. It seems to me that the learned county court judge had no right to consider anything else but this: Was the daughter in fact wholly dependent on her father's earnings at the time of his death, or had she any other source of income?"¹⁹

An award for total dependency of a mother upon the contributions of her deceased son was sustained, even though brothers and sisters of the deceased were looking to the common fund to which the deceased contributed for support; the court saying: "For the purposes of this proceeding the facts show appellee to be the head of a family composed of herself and three minor children (the deceased being 19 years of age). No other person is claiming compensation from appellant, nor is any other person shown to bear the same relation to the deceased as appellee. The other minor children looking to their mother for support from the common fund, of which she was the custodian and disburser. No legal obligation rested on the deceased to support his minor brother and sister, but under the facts found appellee was legally and morally bound to support her minor children. Her means of so doing was the common fund placed in her hands, to which the deceased son contributed all his earnings. On the facts found there is no merit in the contention that appellee is not the proper person to maintain this proceeding and receive the compensation legally due from appellant."²⁰

Where a mother received contributions from a minor son as well as partial support from her divorced husband, the court, in holding that she was a total dependant, said: "Total dependency exists where the dependent subsists entirely on the earnings of the workman; but in applying this rule courts have not deprived claimants of the rights of total dependents, when otherwise en-

19. *Simms v. Lilleshall Colliery Co. Ltd.*, (1917), W. C. & Ins. Rep. 218, 16 N. C. C. A. 147.

20. *People's Hardware Co. v. Croke*, 64 Ind. App. —, 118 N. E. 314, 1918, 16 N. C. C. A. 179.

titled thereto, on account of temporary gratuitous services rendered them by others, or on account of occasional financial assistance received from other sources, or on account of other minor considerations and benefits which do not substantially modify or change the general rule as above stated. * * * Applying this rule to the case at bar we cannot say that appellee was totally dependent on her deceased son, within the meaning of the workmen's compensation act, but on the facts found by the board we hold as a matter of law that she was partially dependent on him for support."²¹

"A widowed mother without means who is supported by her son, partly by the wages of his employment and partly by the yield of his land is wholly dependent upon her son for support, within the meaning of the Minnesota Compensation Act. To constitute total dependency, within the meaning of the act it is not necessary that the dependent be supported wholly out of the wages of the employee's employment."²²

Where the putative father of an illegitimate unborn child made public his intentions to marry the pregnant mother of the child, but was killed four days prior to the consummation of his intentions it was held under the British Act that an award for partial dependency was erroneous, and an award of total dependency was ordered.²³

Where invalid parents were totally dependent upon their deceased son for support, the mere fact that a daughter, who had been paid for keeping house for them had, prior to the son's death, ceased to exact compensation for her services, would not be sufficient to render them only partially dependent.²⁴

21. *Bloomington-Bedford Stone Co. v. Phillips*, 64 Ind. App. —, 116 N. E. 850, 16 N. C. C. A. 181.

22. *State ex rel. Crookston Lbr. Co. v. District Court of Beltramia Co.*, 131 Minn. 27, 13 N. C. C. A. 555, 154 N. W. 509.

23. *Harris v. Powell Duffryn Steam Coal Co., Ltd.*, 9 B. W. C. C. 93, 13 N. C. C. A. 274.

24. *State ex rel. Splady v. District Court of Hennepin County*, 128 Minn. 338, 151 N. W. 123, 9 N. C. C. A. 580.

Mere gratuitous remittances by an aunt and a sister are not sufficient to prevent an award for total dependency of a mother and sister, otherwise wholly dependent upon the deceased.²⁵

A finding of total dependency of an invalid sister who was supported by deceased was sustained, although the evidence showed that she had a life interest in the land and house occupied by her deceased sister and that the property was worth about \$2000.00, although there was no evidence pertaining to encumbrances or to the cost of upkeep and, as a matter of law, such finding was held not to be erroneous.²⁶

Under the Massachusetts Act, as amended, a dependent mother of a deceased fireman, killed in the employment of the city, was denied compensation on the ground that he was a public official and not a "workman, laborer or mechanic," within the meaning of the act.²⁷

§ 373. Dependency of Parents, Grand Parents, and Other Near Relatives of Deceased Workmen.—Dependency of other persons enumerated in the statute as dependents, but not conclusively presumed to be dependents, must be determined upon the particular facts as they existed at the time of the accident or death (as the statute may provide). The following cases illustrate the different conditions under which such persons may be deemed to be dependents under the various acts.

An award to each of the parents of the deceased cannot be sustained under the New York Act, and the award to the mother should be stricken out, for the award to parents cannot exceed 25 percent of the deceased's wages.²⁸ Where an award is made

25. *Petrozino v. American Mutual Liab. Co.*, 219 Mass. 498, 107 N. E. 370, 9 N. C. C. A. 594.

26. *In re Buckley*, 218 Mass. 354, 5 N. C. C. A. 613, 105 N. E. 979.

27. *Devney v. City of Boston*, 223 Mass. 270, 111 N. E. 788.

28. *Intini et ux. v. Stittville Canning Co.*, 181 N. Y. S. 890, 191 App. Div. 933, 6 W. C. L. J. 83; *Skarpeletzo v. Cunes & Raptis Corp.* 228 N. Y. 46, (1920), 126 N. E. 268, 5 W. C. L. J. 720.

to both parents under the Massachusetts Act, the relative extent of their dependency must be found, as an award made to them jointly is improper.²⁹

Evidence that about three years before the accident the deceased, an employee, 32 years of age, sent \$45.00 of his wages to his father 84 years old, residing in Italy, and that about a year before the accident, the deceased sent \$44, raises no legal presumption that payment was made to assist in the father's support or to establish dependency under a section of the Illinois statute providing: "If no amount is payable under paragraph (a) of this section and the employee leaves any widow, child, parent, grandparent or other lineal heir, to whose support he had contributed within four years previous to the time of his injury, a sum equal to four times the average annual earnings of the employee' shall be paid for an injury to the employee resulting in death. The court said: "The act as thus worded was in force at the time of Maero's death. It does not require that the surviving parent shall be dependent upon the deceased but it is sufficient if the deceased employee leaves a parent to whose support he has contributed within four years immediately prior to the injury. *Commonwealth Edson Co. v. Industrial Board*, 277 Ill. 74, 115 N. E. 158. In *Bromwell v. Estate of Bromwell*, 139 Ill. 424, 426, 28 N. E. 1057, it was stated: 'Where one pays money to another and there is no explanation of the cause of such payment, the ordinary presumption is that the money was paid because it was due and owing, and not by way of a loan. * * * This is undoubtedly the rule where only business relations exist between the parties. But where other relations exist, there may doubtless be ground for presumptions of a different character. Thus, where a husband hands money to his wife, or a father to a child still dependent upon him, the presumption naturally arising is that the act is in performance of legal obligation resting upon husband or father to maintain or support the wife or child.' The presumption as to payment of money, as shown by the above decision is one of fact rather than

29. In re Pagnoni, — Mass. —, 118 N. E. 948; 1 W. C. L. J. 806.

one of law—a mere rule of evidence—an inference to be drawn from the facts and circumstances of the particular case. We do not think that any legal presumption can be drawn from the fact of the payment to the father, 84 years old, by his son, 32 years old, that this payment was made to assist in the father's support rather than pay an ordinary debt for service rendered or for money loaned.'³⁰

The fact that a mother had made a will in favor of her deceased son, who had contributed to her support, was not material in determining her claim to the benefit provided by the Workman's Compensation Act, where there was no evidence that the will was the result of an agreement to give him all her property or of any agreement.³¹

The minority of an employee in no way affects the question of the dependency of a parent on his earnings.³²

When a minor gives his wages to his father for the aid of him and his children, the father is thereby constituted an "actual dependent" within the meaning of the New Jersey Act.³³

The mere fact that a parent or grandparent receives money or gifts from a child and expends it, is not alone sufficient to establish dependency.'³⁴

30. *Peabody Coal Co. v. Indus. Comm.* 289 Ill. 330, 124 N. E. 566, 5 W. C. L. J. 27; *In re Otto G. Jorgensen*, 2 A. R. U. S. C. C. 75; *In re Horace A. Pelletier*, 2 A. R. U. S. C. C. 76.

31. *Mississippi River Power Co. v. Indus. Comm.*, 289 Ill. 353, (1919), 124 N. E. 552, 5 W. C. L. J. 50.

32. *Friscia v. Drake Bros. Co.*, 167 App. Div. 496, 153 N. Y. Supp. 392.

33. *Colucci v. Edison Portland Cement Co.*, 93 N. J. L. 332, 108 Atl. 313, 5 W. C. L. J. 302; *Turner v. Miller and Richards*, 3 B. W. C. C. 305, 6 N. C. C. A. 242.

34. *Birmingham v. Westinghouse Electric & Mfg. Co.*, 180 App. Div. 48, 167 N. Y. S. 520; *Mulraney v. Brooklyn Rapid Transit Co.*, 180 N. Y. S. 654, 190 App. Div. 774, 5 W. C. L. J. 731; *Main Colliery Co. v. Davies*, (1900) A. C. 358, 69 L. J. Q. B. 755; *Atwood v. Conn. Light & Power Co.*, — Conn.—, (1921), 112 Atl. 269, *Kelley v. Hoefler Ice Cream Co.*, — App. Div. —, (1921), 188 N. Y. S. 584.

A father contributing \$12.00 a week to a family maintenance fund is not dependent upon a son who contributed a like sum.³⁵

A duty rests upon a minor to turn over his wages to his parents, and a correlative right to receive such wages rests in the parent. Therefore a promise by a son to send money to his mother for her support sufficiently constitutes dependency, even though he never had a pay day before his death affording him an opportunity to consummate his purpose. Although under ordinary circumstances "a simple expression of purpose to contribute to support, unaccompanied by any actual contribution after reasonable opportunity, would not constitute dependency."³⁶

Actual support of parents of the deceased within a year prior to death of the son is necessary to establish their dependency under the New York Act.³⁷

Where a son has contributed to the support of his parents within four years prior to the time of his injury, the parents are entitled to compensation under the Illinois Act, independent of the fact that they were not dependent upon him.³⁸

And the contributions of the minor need not exceed his own expenses, expended for him by his parents, since the parents are under a legal obligation to support him.³⁹

35. *Klein v. Brooklyn Heights R. Co.*, 177 N. Y. S. 67, 188 App. Div. 509, 4 W. C. L. J. 432; *Henry Pratt Co. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 754, 6 W. C. L. J. 296.

36. *Freeman's Case*, 233 Mass. 287, 123 N. E. 845, 4 W. C. L. J. 498; *Alden Coal Co. v. Indus. Comm.*, — Ill. — (1920), 127 N. E. 641, 6 W. C. L. J. 274; *Parson v. Murphy*, — Neb. —, 163 N. W. 847, B. I. W. C. L. J. 1100.

37. *Profeta v. Retsof Mining Co.*, 177 N. Y. S. 60, 188 App. Div. 383, 4 W. C. L. J. 444.

38. *Humphrey v. Indus. Commission of Ill.*, 285 Ill., 372, 120 N. E. 816, 3 W. C. L. J. 102; *Mallors v. Indus. Bd. of Ill.*, 281 Ill. 418, 117 N. E. 1056, 1 W. C. L. J. 522, 16 N. C. C. A. 175; *Commonwealth Edison Co. v. Indus. Bd.*, 277 Ill. 74, 115 N. E. 158; *Rockford Cabinet Co. v. Indus. Comm.*, — Ill. —, (1920), 129 N. E. 142, 7 W. C. L. J. 280.

39. *Metal Stampings Corp. v. Indus. Comm.*, 258 Ill. 528, 121 N. E. 258, 3 W. C. L. J. 258; *In re Peters*, 64 Ind. App. —, 116 N. E. 848, 16 N. C. C. A. 183; *Richardson Land Co. v. Indus. Comm.*, — Ill. —, (1921), 129 N. E. 751.

Where a father is partially dependent upon a deceased son, he is entitled under the Kentucky Act, to his proportionate share of an award, even though the deceased left a totally dependent widow.⁴⁰

Where there is no evidence that the moneys contributed to the family were in excess of the amount required for deceased's board and expenses, the parents have not established their dependency under the Kansas Act.⁴¹

Where a father earns sufficient to support his family after proper deductions are made for the contribution of a son, the father or family are not dependent upon the son, for the principle of the act is compensation, and the question of dependency is one to be determined in each case.⁴²

A mother may maintain proceedings for the death of a son who contributed all his earnings to her, as head of the family, even though other children were also supported from the same fund.⁴³

The Kansas Supreme Court in holding that parents are not dependent upon a child not legally adopted, said: "While the expression 'legal adoption' has become common, it is really tautological. The full meaning would be expressed by the single word

40. *Penn et. al. v. Penn.*, 183 Ky. 228, 209 S. W. 53, 3 W. C. L. J. 634; *Robinson v. Anon.*, (1904), 6 W. C. C. 117.

41. *McGarvie v. Frontenac Coal Co.*, 103 Kan. 586, 175 Pac. 375, 3 W. C. L. J. 46; *Jedreinich v. James Shewan & Sons*, 183 N. Y. S. 111, (1920), 6 W. C. L. J. 480; *Federal Mut. Liability Ins. Co. v. Indus. Comm.*, — Cal. —, 199 Pac. 796, (1921).

42. *Moll v. City Bakery*, 199 Mich. 670, 165 N. W. 649, 1 W. C. L. J. 391, 16 N. C. C. A. 186; *Foskett v. A. J. Buschmann Co.*, 183 N. Y. S. 919, (1920), 6 W. C. L. J. 562; *Schedrick v. Volney Paper Co.*, 184 N. Y. S. 424, (1920), 7 W. C. L. J. 103; *Reidnick v. White Bros.*, — Del. —, 109 Atl. 881, 6 W. C. L. J. 138.

43. *Peoples Hardware Co. v. Croke*, 64 Ind. App. —, 118 N. E. 314, 1 W. C. L. J. 579, 16 N. C. C. A. 186; *McLean v. Moss Bay Iron & Steel Co.*, (1910), 2 B. W. C. C. 282, C. A. 313, W. C. C. 402; *Hodgson v. Owners of West Stanley Colliery A. C. (H. L.)* 229, 3 B. W. C. C. 260; *Ford v. Oakdale Colliery Co.*, (1915), 8 B. W. C. C. 127; *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L.R.A. 1916A, 436; *Halbeisen v. H. Koppers Co.*, N. J. (1920), 113 Atl. 921.

'adoption' because taking a child into a family and treating it as a natural offspring is not adoption. If, however, some legislative purpose must be found for qualifying the word 'adoption' by the word 'legal,' it must have been to exclude all grafting of children upon another family stock otherwise than by adoption proceedings conforming to the law governing the subject."⁴⁴

An invalid father, who is supported by his minor son through his earnings, savings and borrowed money, is dependent upon the son, and the question as to whether the son's earnings exceeded the cost of his maintenance is immaterial.⁴⁵

Under the New Jersey Act a father is entitled to 25 per cent of the average weekly earnings of his son, upon whom he was actually dependent, despite the fact that there were brothers and sisters of deceased, for they were not legally dependent upon him merely because their father was assisted in supporting them, and the fact that the son leaves a widow does not preclude the father from his proportionate share.⁴⁶

But a later case holds that, where a sister had been supported out of wages of a deceased brother given to the family fund, she is an actual dependent, irrespective of the fact that the father was legally obligated to support her.⁴⁷

In considering the question whether or not the contributions of a son were part of the mother's income, the court said: "The argument of relator that the son's contributions were voluntary,

44. *Ellis v. Nevins Coal Co.*, 100 Kan. 187, 163 Pac. 654, 16 N.C.C.A. 178.

45. *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025, 13 N. C. C. A. 315; *In re Murphy*, 218 Mass. 278, 105 N. E. 635, 5 N. C. C. A. 716; *Stevenson v. Illinois Watch Case Co.*, 186 Ill. App. 418, 5 N. C. C. A. 858.

46. *Havey v. Erie Ry. Co.*, 88 N. J. L. 684, 96 Atl. 995, 13 N. C. C. A. 319; *Rev'g.* 87 N. J. L. 444; *Blanz v. Erie R. Co.* 87 N. J. L. 367, 85 Atl. 1030, 3 N. C. C. A. 590; *McFarland v. Cent. Ry. Co.*, 84 N. J. L. 435, 87 Atl. 144, 4 W. C. L. J. 592; *Tischman v. Central R. Co.*, 84 N. J. L. 527, 87 Atl. 144, 4 N. C. C. A. 736; *Quinlan v. Barber Asphalt Paving Co.*, 84 N. J. L. 510, 87 Atl. 127, 11 N. C. C. A. 715.

47. *Connors v. Public Service Elect. Co.*, 89 N. J. L. 99, 97 Atl. 792, 13 N. C. C. A. 321; *Driscoll v. Jewell Belting Co.*, — Conn. —, 114 Atl. 109, (1921).

in the nature of gifts to his mother, is not entirely sound, as we should not lose sight of the probability that she had earned these contributions, and that the son was doing no more than his duty. But treating the payments as voluntary, even as gifts, the letter as well as the spirit of the compensation law compels the conclusion that the legislature intended that such contributions should be considered as forming a part of the income of the partial dependent. The cases relied on by relator are not compensation cases, and have little application. The question is not whether the presents which a man receives are a part of his 'income,' speaking in a general sense, but what was the legislative intent as to whether regular contributions by a workman to his mother should be considered as a part of her income in determining the amount of her compensation as a partial dependent. In subdivision 17 of section 14 the 'income loss' of a partial dependent from the death is made the amount to be received in case it is less than the minimum of \$6.50 per week. Clearly here the contributions of the workman are treated as 'income.' If such contributions are not income, there is no income loss. Again, the law clearly shows an intent that actual dependents shall receive more compensation than partial dependents. In this case, if relator's contention is sustained, she would be entitled to greater compensation than if she were an actual dependent."⁴⁸

A mother may be dependent upon an illegitimate son who lived with her and her husband and turned over his wages to his mother for her use, if it was reasonably necessary that she use the moneys for her support and medical attention, and this irrespective of the fact that the husband was living, if his wages were insufficient to care for the mother.⁴⁹

48. *State ex rel. Hayden v. District Court of St. Louis County*, 133 Minn. 454, 158 N. W. 792, 13 N. C. C. A. 331. But see *McDonald v. Great Atlantic and Pac. Tea Co.*, — Conn. —, (1920), 111 Atl. 65; 6 W. C. L. J. 525; *Henry Pratt Co. v. Indus. Comm.*, — Ill. —, (1920), 127 N. E. 754, 6 W. C. C. J. 296.

49. *Smith v. National Sash and Door Co.*, 96 Kan. 816, 153 Pac. 533, 13 N. C. C. A. 332.

But under the English Act the husband of the mother of such illegitimate child is not considered a dependent of the child.⁵⁰

An unmarried sister, who had been actually supported by a brother during her pregnancy and after the birth of a child up until his death, was entitled to compensation as a partial dependent, as in view of her financial means and ability to earn a livelihood, she would require some assistance in the future.⁵¹

In the absence of evidence to show that the deceased's infant brother was actually dependent upon him, or that his father was unable to support him, an award in favor of the brother was erroneous.⁵²

A half brother of deceased, who was living with his mother, but was dependent upon and receiving support from the deceased, was an actual dependent and entitled to compensation, irrespective of the fact that the deceased's contributions were made to the mother for the support of the half brother.⁵³

The Texas Act makes brothers and sisters of the deceased beneficiaries thereunder.⁵⁴

Where the deceased left a minor daughter, his sister is not the next of kin, and can have no claim upon the death benefit, unless she was a member of the family partly dependent upon his earnings for support at the time of his death.⁵⁵

A sister who is supported by a brother under an agreement that she keep house cannot be deprived of compensation on the

50. *McLean & Wife v. Moss Bay Iron & Steel Co.*, 2 B. W. C. C. 282, 6 N. C. C. A. 244.

51. *Jackson v. Indus. Acc. Comm.*, 164 Wis. 94, 159 N.W. 561 13 N.C. C. A. 458.

52. *Mulraney v. Brooklyn Rapid Transit Co.*, 190 App. Div. 774, 180 N. Y. S. 654, 5 W. C. L. J. 731.

53. *O'Flynn's Case*, (1919), 232 Mass. 582, 122 N. E. 767, 4 W. C. L. J. 105.

54. *American Indemnity Co. v. Zylonia*, — Tex. Civ. App. —, (1919), 212 S. W. 183, 4 W. C. L. J. 315; *Vaughan v. Southwestern Insurance Co.*, — Tex. —, 206 S. W. 920.

55. *In re Murphy*, 230 Mass. 99, 117 N. E. 794, 1 W. C. L. J. 211.

ground that she could support herself, she being a competent stenographer, but precluded from working because of ill health.⁵⁶

The New York Act, limiting dependents to widows and next of kin, was held to include a mother and half brothers and sisters who were partially dependent upon the deceased.⁵⁷

A niece who stayed with an uncle while attending school, receiving board and clothes, was held not to be a dependent within the meaning of the Indiana Act.⁵⁸

A sister who actually receives aid from her brother may be a dependent, despite the fact that she is at the time earning wages, for there is no standard set as to just when a person will be said to be earning sufficient to remove him or her from the category of dependents, if assistance is actually being received. So a stenographer earning \$10.00 a week and receiving aid from her brother may be found to be partial dependent.⁵⁹

Where a sister is dependent upon the contribution of a brother to the family fund, she is, under the New York, Act, entitled to compensation upon his death, irrespective of the fact that the moneys she depended upon were paid into the family fund, or that there were also awards made to the father and mother for their proportionate dependency.⁶⁰

A sister-in-law, with whom the deceased had stopped and to whose support he had contributed, is not a dependent, for she is not included in the classes of relatives enumerated by the California Compensation Act.⁶¹

56. *In re Lanman*, 64 Ind. App.—, 117 N. E. 671, 1 W. C. L. J. 185; *Kenney v. City of Boston*, 222 Mass. 401, 111 N. E. 47, 13 N. C. C. A. 461.

57. *Bylow v. St. Regis. Paper Co.*, 179 N. Y. App. Div. 555, 166 N. Y. S. 874, 16 N. C. C. A. 152.

58. *In re Lanman*, 64 Ind. App. —, 117 N. E. 671, 16 N. C. C. A. 156.

59. *Miller v. Riverside Storage and Cartage Co.*, 189 Mich. 360, 155 N. W. 462, 13 N. C. C. A. 462; *Hammill v. Penn. R. Co.*, 88 N. J. L. 717, 13 N. C. C. A. 465; 96 Atl. 292.

60. *Walz v. Holbrook, Cabot and Rollins Corp.*, 170 N. Y. App. Div. 6, 13 N. C. C. A. 464; 155 N. Y. S. 703; *In re Edward N. Johnston*, 2nd A. R. U. S. C. C. 73.

61. *Western Indemnity Co. v. O'Brien*, 2 Cal. I. A. C. 419 (1915).

In holding that a half sister, who was also a sister by adoption, was not a member of the deceased's family nor his next of kin, the court said: "The employee was not the head of a family. He maintained no household. He simply was a boarder in the family of another. He paid the board of the claimant for about 3 months before his death, in the same family. He was under no obligation to support her. That duty rested upon her father who, as the board found, maintained a suitable home and repeatedly asked her to come to it. These circumstances show that she was not a member of the family of the employee. Family in its usual sense means 'the collective body of persons who live in one house, and under one head or management.' *Dodge v. Boston & Providence R. Corporation* 154 Mass. 299, 301. That is the significance ordinarily attributed to the word under the act. *Kelley's Case*, 222 Mass. 538. See *Newman's Case*, 222 Mass. 563, 568." As to 'next of kin,' the court said: "The claimant being the natural half sister and the sister by adoption of the deceased employee, manifestly was not his next of kin, because his adopting father, being the only living parent, stands in the relation of next of kin to the deceased employee. R. L. c. 154, Sec. 7, and Chapter 133, Sec. 1. The words 'next of kin' in the workmen's compensation act refer to those who are nearest in degree. *Kelley's Case*, 222 Mass. 538, 541; *Murphy's Case*, 224 Mass. 592, 113 N. E. 283. The circumstance that, if there had been no adoption, or if the deceased had inherited property from his natural relatives through or from his mother, there might be a descent of that estate to some one other than the adopting father, is immaterial in this connection." The decree was modified by striking out all the words thereof and substituting therefor the words: "This case came on to be heard at this sitting and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the claimant was not a dependent upon the employee at the time of his decease, and that the case is dismissed." In *re Gould*, 215 Mass. 480, 4 N. C. C. A. 60 (1913).

Superior Court Equity Rule 37, Edition of 1906. As so modified the decree was affirmed.⁶²

A niece, although profiting by contributions from her uncle, did not sustain the degree of relationship required of dependents by the New Jersey Act. It is not enough that one is dependent upon an employee, but he or she must come within the provisions of the statute designating who shall be dependents.⁶³

A parent may be dependent upon a minor child as well as upon an adult child, and a contention that the deceased's parents were not entitled to compensation because the deceased left no surviving wife or child was overruled, the court saying: "The evident intent of the statute is to limit all of the compensation to 66⅔ per cent. of the wages of the deceased, and to give compensation to the surviving wife, children, grandparents, or parents, who are dependent only if such compensation can be brought within the maximum percentage allowed. Each parent or grandchild is allowed 15 per cent of such wages during his dependency, if the allowance to the widow and children does not equal 66⅔ per cent. of the wages. This condition exists where there is no widow or children, and the Commission was justified in awarding compensation to the parents, even though the deceased was unmarried at the time of his death."⁶⁴

A mother may be dependent upon a son, even though her husband is living, if the son actually contributes to her support.⁶⁵

Where a mother was not receiving support from her son but claimed compensation on the theory that he was under a legal obligation to support her, the court said: "The claimant was not dependent upon deceased at the date of the accident by reason

62. *In re Cowden*, 225 Mass 66, 113 N. E. 1036, 13 N. C. C. A. 466.

63. *Berger v. Thomas Oakes & Co.*, 39 N. J. L. J. 296, 13 N. C. C. A. 468.

64. *Frischia v. Drake Bros. Co.*, 167 App. Div. 496, 153 N. Y. S. 392, 9 N. C. C. A. 581.

65. *Krauss v. Geo. H. Fritz & Son, Inc.*, 87 N. J. L. 321, 93 Atl. 578. 9 N. C. C. A. 582; *Garrabrant v. Morris & Somerset Elec. Co.*, 37 N. J. L. J. 208; *Odgen City v. Indus. Comm.*,—Utah—, (1920), 193 Pac. 857, 7 W. C. L. J. 249.

of any support rendered by deceased; she did not belong to the class conclusively presumed to be dependents. While a son is always under a moral obligation to support his indigent mother, he is under no legal obligation until proceedings under the statute result in an order compelling him to do so." As no such order had issued, the claim that deceased was under a legal obligation to support his mother was not sustained.⁶⁶

The fact that a father could maintain his family independent of the deceased's assistance, will not preclude a recovery where the son was actually assisting.⁶⁷

Where a son contributes to a father from moneys other than his earnings, the father is not a dependent upon his deceased's sons earnings.⁶⁸

A father, who receives contributions from his son, may be partially dependent upon him, even though the father is contributing to the support of a crippled brother.⁶⁹

As a general rule parents are dependent upon a son who contributes to their support, but the difficulty lies in determining to what degree they are dependent.⁷⁰

Where a son has been in the habit of regularly contributing to his parent's support, a temporary cessation of contributions, when the son changed places of employment, does not preclude an award, and a finding that had death not intervened the son would have continued his contributions was sustained by the evidence.⁷¹

66. *Pinel v. Rapid Ry. Transit System*, 184 Mich. 169, 150 N. W. 897, 9 N. C. C. A. 584.

67. *Howells v. Vivian & Sons*, (1901), 50 W. R. 163, 85 L. T. 529, 18 L. T. R. 36, 4 W. C. C. 106.

68. *Kelley v. Arroll & Co.*, (1905), 42 Sc. L. R. 695, 6 N. C. C. A. 243.

69. *Legget & Sons v. Burke*, 9 Sc. L. T. 518, (1902), 6 N. C. C. A. 244.

70. *Stevenson v. Illinois Watch Co.*, 186 Ill. App. 418, 5 N. C. C. A. 858; *Day v. Sioux Falls Fruit Co.*,—S. Dak.—, (1920), 177 N. W. 816, 6 W. C. L. J. 216; *Geo. A. Lowe v. Indus. Comm.*,—Utah—, (1920), 190 Pac. 934, 6 W. C. L. J. 216.

71. *Turner v. Miller & Richards*, 3 B. W. C. C. 305, 6 N. C. C. A. 245;

Under the Illinois Act a dependent mother is entitled to the whole award, where the deceased also leaves nondependent brothers and sisters.⁷²

A father, who is in a workhouse, is not dependent upon a son who had not contributed to his support while detained there, though under an indirect obligation to do so, for there is no actual dependency.⁷³

Where a workman is capable of earning enough to provide for the necessities of one in his station of life, he is not a dependent upon a son who has been making contributions to his support, where it is not shown that the contribution were from the earnings of the deceased son.⁷⁴

A mother is a dependent of a deceased son who actually supported her, irrespective of the fact that there were other children liable for her support.⁷⁵

Under the Washington Act, compensation to parents who are actually dependent upon a minor child is not limited to the time when the deceased should become of age. They are entitled to compensation as long as the dependency lasts.⁷⁶

Under the Michigan Act a claim may be made in the name of both the father and mother of a deceased workman, and there need be no stipulation filed showing that the contributions were for the father's benefit alone.⁷⁷

Southern Surety Co. v. Hibbs,—Tex. Civ. App.—, 221 S. W. 303, 6 W. C. L. J. 224.

72. *Matecny v. Vierling Steel Works*, 187 Ill. App. 448, 6 N. C. C. A. 247.

73. *Rees v. Penrikyber Nav. Colliery Co.*, 5 W. C. C. 177, 1903, 1 K. B. 259, 6 N. C. C. A. 266; *Trainer v. Addie & Sons' Collieries Ltd.*, (1904), 42 S. L. R. 85; 7 F. 115, 6 N. C. C. A. 266.

74. *Sir William Arrol & Co. Ltd., v. Kelly*, 7 F. 906, 42 Sc. L. R. 695, 6 N. C. C. A. 274.

75. *Rintoul v. Dalmeny Oil Co., Ltd.*, (1908), 1 B. W. C. C. 340, 6 N. C. C. A. 275; *Rogers v. Dow Chemical Co.*,—Mich. Ind. Bd.—, 6 N. C. C. A. 275.

76. *Boyd v. Pratt*, 72 Wash. 306, 130 Pac. 371, 2 N. C. C. A. 599.

77. *Buhse v. Whitehead & Kales Iron Works*, 194 Mich. 413, 160 N. W. 557.

Where, under the New York Act, a grandmother was found to be actually dependent, compensation was awarded.⁷⁸

A foster mother who had never legally adopted the deceased employee, has been held not to be a dependent within the contemplation of the compensation acts.⁷⁹

Under some acts, neither the mother nor the putative father of an illegitimate child are entitled to compensation, especially where the mother is supported by her husband, with whom she is living.⁸⁰

A sister-in-law was not a dependent within the statutory classification of dependents given in the California Act, prior to the amendment which took effect August 8, 1915.⁸¹

"In an action under the Kansas Workmen's Compensation Act (Gen. St. 1915, Sections 5903, 5905) by the father and mother of a deceased workman for compensation for his death, a finding of partial dependency is sustained by evidence that the parents did in fact depend in part on the son's earnings, so that they suffered injury by being deprived of what they had relied on; and this is true although the father owns a home for which he paid \$1,450, owns land from which he derives income of \$400 or \$500 a year owns shares of stock in a corporation on which he has paid \$5,000, and is employed at a salary of \$125 a month."⁸²

A brother over the age of 16 is not a dependent if physically capable of earning his living at any kind of work.⁸³

The provision in the compensation act, limiting compensation to children until they reach an age designated by statute, has no application to a minor dependent, a sister of deceased, whose de-

78. *Chase v. Fairbanks, Morse & Co.*, 4 N. Y. St. Dep. Rep. 369.

79. *Re Leonardo Garcia Op. Sol. Dep. C. & L.* 611; *Weaver v. The As-sawaga, Co.*, 1 Conn. Comp. Dec. 331.

80. *McLean v. Mass. Bay Hematite Iron & Steel Co.*, (1909), 100 L. T. 811, 2 B. W. C. C. 282; *In re Cowden*, 225 Mass. 66, 113 N. E. 1036.

81. *Western Indem. Co. v. O'Brien*, 2 Cal. Ind. Acc. Com. 419.

82. *Fennimore v. Pittsburg Scammon Coal Co.*,—Kans.—, 164 Pac. 265, A 1 W. C. L. J. 611.

83. *Morgan v. Butte Cen. Min. & Mill Co.*,—Mont.—, (1920), 194 Pac 496.

pendency was not founded upon the relationship of parent and child.⁸⁴

An aunt with whom deceased and his sister had lived since childhood, and who had property of her own, was not a member of deceased's family so as to entitle her to compensation, but from the evidence, deceased was a member of her household and not the master of the house.⁸⁵

Parents are dependent upon a son who contributed \$824 to the family fund where his contributions exceeded the cost of his maintenance, even though \$900 of the family fund was used to pay off an indebtedness on the home.⁸⁶

Where the son's contributions do not exceed the cost of his maintenance, but he assists in paying off a debt of the family, the parents are not dependents.⁸⁷

Dependency of parents under the Utah Act is to be determined upon the facts as they existed at the time of the injury, although it need not be shown that contributions were made at the precise time of the injury, still mere voluntary gifts, promises or intentions in case it became necessary, will not establish dependency.⁸⁸

The mere fact that a daughter never worked, she being 18 years of age will not constitute her a dependent.⁸⁹

Where a son was managing a mother's business, not receiving any pay from her, nor contributing to her support, the fact that she wrote him to come to another state to work for her to help her, and that he intended to do so as soon as he earned enough money to

84. *Hasselman v. Travelers' Insurance Co.*,—Colo.—, 185 Pac. 343, 5 W. C. L. J. 153.

85. *Stafford's Case*, 130 N. E. 109,—Mass.—, (1921),

86. *Milwaukee Basket Co. v. Indus. Comm.*,—Wis.—, (1921), 181 N. W. 308.

87. *Wisconsin-Minn. Light & Power Co. v. Indus. Comm.*, — Wis.—, (1921), 181 N. W. 311.

88. *Globe Milling Co. v. Indus. Comm.*,—Utah—, (1920), 193 Pac. 642, 7 W. C. L. J. 245; *Hancock et al. v. Indus. Comm.*, —Utah—, (1921), 196 Pac. 169.

89. *In re Mrs. McGaughey*, 2nd A. R. U. S. C. C. 74; *In re Addison Ellison*, 2nd A. R. U. S. C. C. 74.

go, but was killed before going, was not sufficient to establish dependency.⁹⁰

Brothers and sisters, not being dependents under the New York Act, cannot, in view of the statute making the compensation act the only authority for recovery in death cases, resulting from industrial accidents, proceed in an action at law.⁹¹

§ 374. **What Children may be Dependents.**—When the word “child” or “children” is used in a statute, which does not define the meaning of such word nor use it in a special sense, it is usually held to include adopted children,⁹² posthumous children,⁹³ and sometimes,⁹⁴ though not generally,⁹⁵ illegitimate children. It may,⁹⁶ or may not,⁹⁷ include adults, depending upon the context and subject matter of the statute.

Grandchildren do not come within such designation,⁹⁸ unless it appears that the word was used in a broad sense, as synonymous

90. *Alden Coal Co. v. Indus. Comm.*,—Ill.—, (1920), 127 N. E. 641, 6 W. C. L. J. 274.

91. *Shanahan v. Monarch Engineering Co.*, — N. Y. App. Div. —, 114 N. E. 795, B 1 W. C. L. J. 1213.

92. *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596; *Power v. Haffley*, 85 Ky. 671, 4 S. W. 683; *In re Walworth's Estate*, 85 Vt. 322, 82 Atl. 7, 37 L. R. A. (N. S.) 849.

93. *State ex rel. v. Soale*, 36 Ind. App. 73, 74 N. E. 1111; *Nelson v. Galveston, H. & S. A. R. Co.*, 78 Tex. 625, 14 S. W. 1021, 11 L. R. A. 691, 22 Am. St. Rep. 89.

94. *Galveston, H. & S. A. R. Co., v. Walker*, 48 Tex. Civ. App. 52, 106 S. W. 705.

95. *Williams v. Witherspoon*, 171 Ala. 559, 55 So. 132; *Jackson v. Hocke*, 171 Ind. 371, 84 N. E. 830; *Truelove v. Truelove*, 172 Ind. 441, 86 N. E. 1018, 27 L. R. A. (N. S.) 220, 139 Am. St. Rep. 404; *Lynch v. Knoop*, 118 La. 611, 43 So. 252, 8 L. R. A. (N. S.) 480, 10 Am. Cas. 807, 118 Am. St. Rep. 391; *Bowerman v. Lackawanna Min. Co.*, 98 Mo. App. 308, 71 S. W. 1062; *Gritla's Case*, — Mass. —, (1920), 227 N. E. 889, 6 W. C. L. J. 319.

96. *Sheffield v. Franklin*, 151 Ala. 492, 44 So. 373, 12 L. R. A. (N. S.) 884, 15 Ann. Cas. 90, 125 Am. St. Rep. 37.

97. *Griffith v. Griffith*, 128 Ga. 371, 57 S. E. 698; *Schleiger v. Northern Ter. Co.*, 43 Ore. 4, 72 Pac. 224.

98. *Starrett v. McKim*, 90 Ark. 520, 119 S. W. 824; *Walker v. Vicks-*

with a word of larger import, such as "issue" or "descendants".¹⁰

Adopted children are dependents of the adopting parents within most of the acts,¹ provided the requirements of adoption were complied with sufficiently.²

But a child adopted by the widow of deceased, after his death, is not a dependent of deceased, entitling it to compensation upon remarriage of the widow.³

And it is not contemplated that one may adopt children for a third person; hence, the adopted child of a daughter of deceased is not his heir or next of kin, and is not entitled to compensation as his dependent.⁴

And where a child was adopted under an agreement that the mother contribute to its support, but the only contribution made by the mother was at the time of adoption, and the child was being supported by the adopting parents, it was not a dependent of its mother.⁵

Illegitimate children are not included within the beneficial provisions of the Compensation Acts of Maryland,⁶ Illinois, and

burg, S. & P. R. Co., 110 La. 718, 34 So. 749; *Clements v. Maury*, 50 Tex. Civ. App. 158, 110 S. W. 185; *Ross v. Martin*, 104 Tex. 558, 140 S. W. 432; *Harrington v. Gibson*, 109 Ky. 752, 67 S. W. 915.

99. *Philips v. Lawing*, 150 Ala. 186, 43 So. 494; *Keeney v. McVoy*, 206 Mo. 42, 103 S. W. 946; *Wilkins v. Briggs*, 48 Tex. Civ. App. 596, 107 S. W. 135, 140.

1. *Yohe v. Erie R. Co.*, 36 N. J. L. J. 154, 9 N. C. C. A. 589; *Winkler v. New York Car Wheel Co.*, 181 App. Div. 239, 168 N. Y. Supp. 826, 1 W. C. L. J. 699, 16 N. C. C. A. 149; *In re Yeople*, 182 App. Div. 438, 169 N. Y. Supp. 584, 1 W. C. L. J. 1135, 16 N. C. C. A. 148; *Bugg v. Mitchell*, 48 Sc. L. R. 606, (1911), S. C. 705, (1911), 1 Sc. L. T. 293, 4 B. W. C. C. 400, 6 N. C. C. A. 263.

2. *Yohe v. Erie R. Co.*, 36 N. J. L. J. 154, 9 N. C. C. A. 589; *Ellis v. Nevins Coal Co.*,—Kan.—, 163 Pac. 654, 1 W. C. L. J. 609.

3. *State ex rel. v. District Court of Ramsey County*, 133 Minn. 265, 158 N. W. 250, 13 N. C. C. A. 276.

4. *Winkler v. New York Car Wheel Co.*, 181 App. Div. 239, 168 N. Y. Supp. 826, 1 W. C. L. J. 699, 16 N. C. C. A. 149.

5. *Bugg v. Mitchell*, 48 Sc. L. R. 606, (1911), S. C. 705, (1911), 1 Sc. L. T. 293, 4 B. W. C. C. 400, 6 N. C. C. A. 263.

6. *Scott v. Independent Ice Co.*, 135 Md. 343, 109 Atl. 117, 5 W. C. L. J. 702.

New York; but are included under other acts when they were living with, and dependent upon the deceased father,⁷ or were receiving their support from him at the time he met with the fatal accident.⁸

And such a child is held to be dependent, although the contributions made by the father for his support were not actually expended in his behalf.⁹

A child 13 years of age living apart from her father must be actually dependent, and the father must be under a legal obligation to support her, before she will be considered a dependent under the Indiana and Michigan Acts.¹⁰

A child over 18 years of age, married and living with her blind husband, she herself being totally blind and therefore physically incapacitated from earning, is entitled under the Massachusetts Act to an equal share of the death benefit with the surviving widow.¹¹

A daughter of a deceased servant's widow, not being a child of the deceased, is not entitled to compensation, even though she was a member of deceased's family.¹²

7. *Murrell v. Indus. Commission*, 291 Ill. 334, 126 N. E. 189, 5 W. C. L. J. 673, (1920); *Bell v. Terry & Tench Co.*, 177 App. Div. 123, 163 N. Y. S. 733, 16 N. C. C. A. 147.

8. *Piccinini v. Conn. Light & Power Co.*, 106 Atl. 330, 93 Conn. 423, 4 W. C. L. J. 18; *Scott's Case*, 117 Maine 436, 104 Atl. 794; *Roberts v. Whaley*, 192 Mich. 133, 158 N. W. 209, L. R. A. 1918 A., 189, 13 N. C. C. A. 191; *Schofield v. Orrell Colliery Co.*, 100 L. T. 104, 2 B. W. C. C. 301; *Bowhill Coal Co. v. Neish et al.*, 46 Sc. L. R. 250; *Taylor v. Powell Steam Coal Co., Ltd.*, 9 B. W. C. C. 477, 13 N. C. C. A. 271; *Gritta's case*,—Mass.—, (1920), 127 N. E. 889, 6 W. C. L. J. 319. *Mitchell v. Fairchild-Gilmore W. Co.*, — Cal. Ind. Comm. —, 6 N. C. C. A. 262; *Gourlay v. Murray*, 15 Sc. L. T. 1029, 6 N. C. C. A. 262.

9. *Bowhill Coal Co. v. Neish*, 46 Sc. L. R. 250, 6 N. C. C. A. 268.

10. *Schwartz v. Gerding & Auman Bros.*,—Ind. App.—, 121 N. E. 89, 3 W. C. L. J. 282; *Roberts v. Whaley*, 192 Mich. 133, 158 N. W. 209, 13 N. C. C. A. 191.

11. *Gavaghan's Case*, 232 Mass. 212, 122 N. E. 5. 298, 3 W. C. L. J. 643.

12. *Holmberg's Case*. 231 Mass. 144, 120 N. E. 353, 2 W. C. L. J. 899.

Married daughters not dependent upon a deceased father, but to whom he had made contributions, are, under the Illinois Act, entitled to compensation on his death.¹³

Support of an incapacitated daughter 22 years old, within four years prior to a fatal accident, is sufficient under the Illinois Act to entitle the daughter to compensation upon the death of the father.¹⁴

Where a girl had been given to her grandparents by an agreement in writing when her parents separated, and she lived with them for over fifteen years, she was entitled as a dependent of her grandfather to be compensated under the workman's compensation act, despite the fact that the parents had reunited. The evidence showed that the mother was lacking in love for the child, and that she would not be at home with her parents, since her real home was with her grandmother.¹⁵

A grown daughter, though capable of earning her own living, may be found to be a dependent of her father, if she was keeping house for him and at the time of his death actually looking to him for and receiving her support from him.¹⁶

An illegitimate child of deceased's daughter cannot be said to be a grandchild, within the meaning of the statute making grandchildren of deceased his dependents, even though the child was living with the family of the deceased. The New Jersey statute

13. *Peabody Coal Co. v. Indus. Bd. of Ill.*, 281 Ill. 579, 117 N. E. 983, 1 N. C. L. J. 524, 16 N. C. C. A. 143.

14. *Mechanics Furniture Co. v. Indus. Bd. of Ill.*, 281 Ill. 530, 117 N. E. 985, 1 W. C. L. J. 529, 16 N. C. C. A. 143; *In re Wm. A. Gentry*, 2nd A. R. U. S. C. C. 72; *In re Edward N. Johnston*, 2nd A. R. U. S. C. C. 73.

15. *In re Yeople*, 182 App. Div. 438, 169 N. Y. Supp. 584; 1 W. C. L. J. 1135, 16 N. C. C. A. 148.

16. *Simms v. Lilleshall Colliery Co., Ltd.*, (1917), W. C. & Ins. Rep. 218, 16 N. C. C. A. 146; *Moyes v. William Dickson Ltd.*, 7 F. 386, 42 S. L. R. 319, (1905), 6 N. C. C. A. 255; *In re Herrick*, 217 Mass. 111, 104 N. E. 433, 4 N. C. C. A. 544; *Marsh v. Boden*, 7 W. C. C. 110, (1905), 6 N. C. C. A. 275.

makes provision for illegitimate children, but not for illegitimate grandchildren.¹⁷

Prior to the amending laws of 1915, to the Minnesota Act, a child over 18 years of age, though supported by the deceased, was not a dependent; but subsequent to the amendment a widowed daughter over 30, deriving part of her support from her father, is a partial dependent and entitled to claim compensation, though she is not physically or mentally incapacitated.¹⁸

Where a mother had contributed to the support of her married son and his family, the court, in denying the son's claim for compensation, said: "An adult son, married and living with his wife and children, separate from his mother, is not a member of such mother's family within the meaning of the Workmen's Compensation Act (Kan. L. 1913, c. 216, Sec. 4)." And in paragraph 2, of the syllabus of this case it is stated: "It is not the purpose or policy of the statute to continue compensation to a dependent minor after reaching the age of 18 years unless physically and mentally incapable of earning wages, or to award compensation to an adult married son, the head of a family living separate from that of his mother, who from her wages as an employee made small contributions towards his support, he being physically and mentally capable to earn, and actually earning, fair wages."¹⁹

The fact that a father lived with his married daughter, paid board and contributed otherwise, did not make her dependent upon him. The daughter was dependent upon her husband, and if there was any dependency upon the father it was the husband who was dependent.²⁰

17. *Splitdorf Electrical Co. v. King*, 90 N. J. L. 431, 103 Atl. 674, 16 N. C. C. A. 151.

18. *State ex rel. Maryland Cas. Co. v. District Court of Ramsey County*, 134 Minn. 131, 158 N. W. 798, 13 N. C. C. A. 263; *In re Carter*, 221 Mass. 105, 108 N. E. 911, 9 N. C. C. A. 579.

19. *Taylor v. Sulzberger & Sons Co.*, 98 Kan. 169, 157 Pac. 435, 13 N. C. C. A. 265.

20. *Montgomery v. Blows*, (1916), 1 K. B. 899, 85 L. J. K. B. 794, (1916), W. C. & Ins. Rep. 89, 114 L. T. 867, 32 T. L. R. 387, 60 Sol. J. 427, 13 N. C. C. A. 268.

Where a father has abandoned his wife and children, the mother obtains a divorce and, the custody of the children has been given to a person other than the father, it cannot be said that the children are living with the father within the conclusive statutory presumption that children living with the parent are dependent upon such parent. The legal obligation of the parent to support the child is insufficient to bring the child within the statutory presumption; and to establish dependency of such children, actual support must be shown.²¹

Under a statute making illegitimate children presumptively dependent when they are part of the decedent's household at the time of his death, an illegitimate posthumous child is considered a part of decedent's household at the time of his death.²²

Where the father of the unborn child of an unmarried woman publicly expressed his intention to marry the woman and four days prior to the marriage, was killed, it was held that the child was entitled to an award for total dependency.²³

A posthumous child has been held to be dependent upon its father, where the father had been contributing to the mother's support, although at the time of the accident he was not so contributing.²⁴

A daughter 16 years old, living apart from her father and earning \$45.00 a month, is a dependent, where the father was actually supporting her.²⁵

Under the English Act, children living apart from their father and not receiving their support from him, are not considered dependents.²⁶

21. *Northwestern Iron Co. v. Indus. Comm.*, 154 Wis. 97, 142 N. W. 271, 3 N. C. C. A. 670.

22. *Klimchak v. Ingersoll Rand Co.*, 39 N. J. L. J. 275, 13 N. C. C. A. 274, *Williams v. Ocean Coal Co., Ltd.*, (1907), 9 W. C. C. 44, 6 N. C. C. A. 260.

23. *Harris v. Powell Duffeyn Steam Coal Co., Ltd.*, 9 B. W. C. C. 93, 13 N. C. C. A. 274.

24. *Queen v. Clark*, (1906), 2 I. R. 135; 4 Ir. L. T. R. 19, 6 N. C. C. A. 260.

25. *In re Hughes*, Ohio I. C., (1914), 6 N. C. C. A. 256.

26. *Pollad v. Great Northern Ry. Co.*, (1912), W. C. & Ins. Rep. 379, 6 N. C. C. A. 260.

Posthumous illegitimate children have been held entitled to compensation as dependents, were the putative father recognized the paternity and arranged to marry the mother.²⁷

A child by a former marriage is entitled to an equal division of an award with the surviving widow.²⁸ But where after the death of the step-father the child goes back to live with his natural father who had been divorced, and the father assumes the obligation of caring for him, the dependency ceases and he becomes a dependent of his natural father, the same rule applying in cases of divorce where custody had been given to the mother.²⁹

Dependent step-children, who have been supported by the deceased, are included within the word "children" in the New Jersey Act.³⁰

Under the Kentucky Code, Supp. 1913, Sec. 2477 m. 16, providing that a child under 16 years of age is conclusively presumed to be wholly dependent upon a deceased employee, and that step-parents shall be regarded in the act as parents, the effect of the latter provision is to substitute a step-parent for an actual parent so that a child whose natural father was killed, but who at the time was living with her stepfather, is not entitled to share in the compensation.³¹

The Supreme Court of Kansas, in construing the Kansas Act, said: "Dependents" means such members of the Workman's family as were wholly or in part dependent upon the workman at the time of the accident. And 'members of a family' for the purpose of this Act means only widow or husband, as the case may be, and children; or if no widow, husband or children, then

27. *Orell Colliery Co. v. Schofield*, (1909), 2 B. W. C. C. 294, 6 N. C. C. A. 261; *Secor v. Security Const. Co.*, 1 Cal. I. A. C. Bull, 6 N. C. C. A. 261; *Lloyd v. Powell Duffryn Steam Coal Co., Ltd.*, (1914), A. C. 733, 7 B. W. C. C. 330, 9 N. C. C. A. 588.

28. *Coakley v. Coakley*, 216 Mass. 71, 4 N. C. C. A. 508.

29. *In re John David Anderson*, 3rd A. R. T. S. C. C. 97; *Gold Dredging Co. v. Indus. Comm.*, 194 Pac. 1.

30. *Newark Paving Co. v. Klotz*, — N. J. L. —, 91 Atl. 91, 6 N. C. C. A. 263. See Wash. Act, 1921 Am. § 6604-3.

31. *Hoover v. Cent. Iowa Fuel Co.*, — Ia. —, (1920), 176 N. W. 945, 5 W. C. L. J. 840.

parents and grandparents; or if no parents or grandparents, then grand-children; or if no grandchildren, then brothers, and sisters. In the meaning of this section parents include step-parents, children include step-children and grand-children include step-grandchildren, and brothers and sisters include step-brothers and step-sisters, and children and parents include that relation by legal adoption.³²

Posthumous children in some jurisdictions have been held not to be dependents of deceased workmen.³³

Where an employee's minor son enlisted in the marines and his four-year term expired after he reached his maturity he voluntarily emancipated himself with his father's consent. There was no legal obligation on the father to support him and he was therefore not entitled to compensation as dependent on the death of the father.³⁴

Divorce does not effect the father's liability for support of a child in the absence of proof of the son's ability to support himself and of his emancipation, even though the son attained his majority pending the proceedings.³⁵

Where an employee was living in adulterous relations with an undivorced wife of another and voluntarily supporting a child of hers by her undivorced husband, it was held that the mothers wrong could not be implied to the child and therefore the child was entitled to compensation as his dependent.³⁶

32. *Smith v. National Sash & Door Co.*, 96 Kan. 816, 153 Pac. 533.

33. *Villar v. Gilbey*, (1907), A. C. 139; *William v. Ocean Coal Co.*, (1907), 97 L. T. 150, 9 W. C. C. 44; *Day v. Markham*, (1904), 6 W. C. C. 115; *Secor v. Security Const. Co.*, 1 Cal. Ind. A. C. (Part II) 93.

34. *Iroquois Iron Co. v. Indus. Comm.*, Ill., — Ill., 128 N. E. 289, 6 W. C. L. J. 646. Note; For cases of children conclusively presumed to be dependent upon deceased, see "Presumption Relating to Dependency." Section 368 ante.

35. *Panther Creek Mines v. Indus. Comm.*, — Ill., —, (1921), 130 N. E. 321; *Auburn & Alton Coal Co. v. Indus. Comm.*, — Ill., —, (1921), 130 N. E. 322.

36. *Moore Shipbuilding Corp. v. Indus. Comm.*, — Cal., —, (1921), 196 Pac. 257.

§ 375. **Alien Dependents, and Constitutionality of Provision Pertaining to Aliens.**—The New York Act provides for payment to aliens not residents of the United States, the same amount provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children or, in the absence of those, to father or mother or grandparents, whom the employee has supported for a year prior to the accident. Under the provisions of this Act, an award of 25% to each parent was an error, and should be modified by striking out the award in favor of the mother, as the award to both parents cannot exceed 25%.³⁷

Where alien non resident parents or wife have not been heard of or from within three or four years, there must be actual proof that they are alive. The rule that one is not presumed to be dead until after he has not been heard of for seven years cannot be invoked to establish the presumptive fact that the wife or parents are living.³⁸

Alien dependents of a deceased servant, subjects of a friendly foreign nation are not excluded from the benefits of the Workmen's Compensation Acts. But the question of dependency is one of fact, and where a wife owns a lot with a good house upon it for the family to live in, it cannot be said that she is totally dependent upon her husband's wages.³⁹

Upon proof of dependency an alien wife is entitled to compensation on the death of her husband, provided she relied upon him

37. *Skarpeletzos v. COUNES & RAPTIS CORP.*, 228 N. Y. 46, 126 N. E. 268, 5 W. C. L. J. 720; *Casella v. McCormick*, 180 N. Y. App. Div. 94, 167 N. Y. S. 564, 16 N. C. C. A. 219; *Intini et. ux. v. Stittville Canning Co.*, 181 N. Y. S. 890, 191 App. Div. 933, (1920), 6 W. C. L. J. 83.

38. *Keystone Steel & Wire Co. v. Indus. Comm.*, 289 Ill. 587, 124 N. E. 542, 5 W. C. L. J. 40.

39. *In re McDonald*, 229 Mass. 454, 118 N. E. 949, 1 W. C. L. J. 808, 16 N. C. C. A. 87, 210; *In re Derinza*, 229 Mass. 435, 118 N. E. 942, 1 W. C. L. J. 795, 16 N. C. C. A. 87, 210; *In re Mooradjian*, 229 Mass. 521, 118 N. E. 951, 1 W. C. L. J. 813, 16 N. C. C. A. 215, 920; *Victor Chemical Works v. Indus. Bd.*, 274 Ill. 11, 113 N. E., 173; *Vujic v. Youngstown Sheet & Tube Co.*, 220 Fed. 390. (D. C.); *Eretza v. Ft. Montgomery Iron Works*, (1920), 184 N. Y. S. 789, 7 W. C. L. J. 98; *In re Pagnonicee*, — Mass. —, 118 N. E. 948, 1 W. C. L. J. 806.

for support, but this is a fact to be proved, and no presumption exists in favor of an alien wife living apart from her husband.⁴⁰

Where deceased left a wife in a foreign country and did not contribute to her support, a mere expression of an intention to bring his family over when he had earned enough money, will not suffice to constitute her a dependent.⁴¹

It has been held in Texas that an alien is not precluded from the protection of the Texas Act merely because the foreign country did not accord like privileges to Americans.⁴²

Where an employee had been living in this country for eight years, during which time his wife had been residing in a foreign country and there was no evidence to show that she was living apart from him for justifiable cause or that he had deserted her, she was held not to be entitled to compensation under the Massachusetts Act.⁴³

Even though the act provides for payment to aliens and non-resident dependents, it does not violate any constitutional provision; for "if it may reasonably be thought that the best interests of the state, of the employers of labor, and of those employed, as well as the public generally, are promoted by imposing upon the industry or the public the burden of industrial accident, the residence and citizenship of dependents, are factors entirely foreign to the discussion."⁴⁴

An act is not unconstitutional because it provides that nonresident alien dependents receive only 33 per cent of the amount

40. *Kalcic v. Newport Mining Co.*, 197 Mich. 364, 163 N. W. 962, 16 N. C. C. A. 211; *In re Gorski*, 227 Mass. 456, 116 N. E. 811, 16 N. C. C. A. 217.

41. *Ludwig v. American Car & Fdry. Co.*, 194 Mich. 613, 161 N. W. 835, 16 N. C. C. A. 212.

42. *Southwestern Surety Ins. Co. v. Vickstrom*, — Tex. Civ. App. —, 203 S. W. 389, 16 N. C. C. A. 225.

43. *In re Fierro's Case*, 223, Mass. 378, 111 N. E. 958, 13 N. C. C. A. 544.

44. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1; *Greene v. Caldwell*, 170 Ky. 571, 12 N. C. C. A. 520, 186 S. W. 648; *Commonwealth v. Goldberg*, 167 Ky. 96, 180 S. W. 68; *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491.

allowed to residents of the state.⁴⁵ But the Kansas Supreme Court holds to the contrary.⁴⁶

An alien mother and sister are entitled to compensation as total dependents irrespective of the fact that an aunt and a sister occasionally made them presents of little value.⁴⁷

The New Jersey Act excludes nonresident aliens from the benefit of the act, and this exclusion does not entitle them to a common-law action for wrongful death.⁴⁸ But where there is no special provision in the act excluding nonresident aliens they are entitled to compensation.⁴⁹ And the personal representative of a deceased resident in the province can recover compensation.⁵⁰

A foreigner, who is a resident of a nation with which the United States has a treaty guaranteeing the same privileges and protection to aliens as to natives, does not have a right of action for the death of a workman, where the law of a state gives such right of action to native relatives and expressly denies it to aliens.⁵¹

Under Sec. 39, C. 15 P. Code 1918, as amended by Sec. 39, C. 131, Acts 1919, (W Va.) the executor or administrator of the estate of a deceased nonresident alien beneficiary may be officially represented in the collection of such accrued and unpaid installments, by the consular officer of the country of which such beneficiary was a citizen or subject.⁵²

45. *Zancanelli v. Central Coal etc. Co.*, 25 Wyo. 511, 173 Pac. 981, 2 W. C. L. J. 715. See Utah Act 1921 Am. § 3140 (8).

46. *Vietti v. Geo. K. Mackie Fuel Co.*, — Kan. —, (1921), 197 Pac. 881.

47. *Petrozino v. American Mutual Liab. Co.*, 219 Mass. 498, 107 N. E. 370, 9 N. C. C. A. 594.

48. *Ronca v. De Grave*, 38 N. J. L. J. 56, 9 N. C. C. A. 594; *Gregutis v. Waclark Wire Wks.*, 86 N. J. L. 610, 92 Atl. 354, *Constanzo v. Hanover Brick Co.*, 37 N. J. L. J. 52. See S. Dak. Am. 1921, § 9458 (8).

49. *Varesick v. British Columbia Copper Co.*, (1906), 12 B. C. 286, 1 B. W. C. C. 446; *In re Jorgensen*, 2nd A. R. U. S. C. C. 75.

50. *Krzus v. Crows Nest Pass Coal Co.*, 6 B. W. C. C. 271, (1912), A. C. 580, 107 L. T. 77, 28 T. L. Rep. 488, 81 L. J. P. C. 227.

51. *De Biasi v. Nomandy Water Co.*, 228 Fed. 234.

52. *Poccardi v. Ott*, — W. Va. —, (1920), 104 S. E. 54, 6 W. C. L. J. 721.

§ 376. **Illegal and Divorced Wives.**—Where a husband and wife were living apart after an interlocutory judgment of divorce for the wife, which contained no provision for her support, it was held that they were living apart by agreement not providing for the wife's support, so that, under section 175, the husband was not personally liable for her support, and she was not entitled to the presumption of total dependency created by the California Workmen's Compensation Act, Sec. 14, Sub'd. A. (1).⁵³

A wife who is not living with her husband, but who is receiving from him money paid pursuant to a decree awarding her separate maintenance, is within section 14, of the California Act, declaring that a wife shall be conclusively presumed dependent for support upon a husband with whom she was living or for whose support such husband was legally liable.⁵⁴

In some states a common-law marriage is sufficient to support an award to one claiming dependency as the wife of deceased.⁵⁵

But the claim of a woman as dependent cannot be allowed on a mere showing that she was living with deceased as his wife, there being no legal marriage;⁵⁶ nor upon proof that she had sustained adulterous relations with the deceased.⁵⁷

A woman who in good faith lived with an employee as his lawful wife, believing that their marriage license in itself constituted marriage, is entitled to compensation under the California Act,

53. *London Guarantee & Accident Co., Ltd., v. Indus. Acc. Comm.*,—Cal.—, (1919), 184 Pac. Rep. 864, 5 W. C. L. J. 20.

54. *Continental Casualty Co. v. Pillsbury*,—Cal.—, (1919), 184 Pac. 658, 5 W. C. L. J. 6.

55. *Voshall v. Kelley Island L. & T. Co.*, 13 Ohio L. R. 278, 60 Ohio L. Bul. 361, 13, N. C. C. A. 199; *In re Morris*, (Ohio Ind. Comm.), 13 N. C. C. A. 199; *Meehan v. Edward Valve & Mfg. Co.*, 64 Ind. App.—, 117 N. E. 265, 16 N. C. C. A. 86; *Brown v. Long Mfg. Co.*,—Mich.—, (1921), 182 N. W. 124.

56. *Scott v. Independent Ice Co.*, 135 Md. 345, 5 W. C. L. J. 702, 109 Atl. 117.

57. *Illinois Steel Co. v. Industrial Comm.*, 290 Ill. 594, 125 N. E. 252, 5 W. C. L. J. 199; *Meehan v. Edward Valve & Mfg. Co.*, 64 Ind. App.—, 117 N. E. 265, 16 N. C. C. A. 85.

1917, Sec. 14, notwithstanding a statute requiring solemnization of marriage.⁵⁸

It is held in other jurisdictions that an honest but mistaken belief that the claimant was married to the deceased employee does not constitute her a dependent.⁵⁹

A divorced wife who was forbidden by the decree to marry within a year, cannot constitute herself the lawful wife of a third party within the forbidden time, within the meaning of the compensation act. Such marriage is void from its inception, and does not even constitute a common law marriage.⁶⁰

A divorced wife, who is supporting herself by her own efforts, cannot be said to be a dependent, for dependency can not be found where there was simply a legal obligation on the part of the husband to support his wife. There must be a reasonable probability that such obligation will be fulfilled.⁶¹

§ 377. **Desertion and Non-Support.**—To constitute desertion within the Iowa Code, Supp. 1913, Sec. 2477 M16, (c) (1). which creates a conclusive presumption that the surviving spouse is wholly dependent upon the deceased employee, unless she willfully deserted him, there must be cessation of the marriage relation, intent to desert, and absence of consent or misconduct upon the party alleged to have been deserted. Therefore, where a husband is unable to support his wife, her separation, with his consent, to earn wages, does not constitute desertion.⁶²

58. *Femescal Rock Co. v. Indus. Acc. Comm.*,—Cal.—, (1919), 182 Pac. 447, 4 W. C. L. J. 469.

59. *In re Jones*, (Ohio Ind. Comm.), 6 N. C. C. A. 250; *Meton v. State Indus. Ins. Department*, 104 Wash. 652, 177 Pac. 696, 3 W. C. L. J. 541; *Armstrong v. Indus. Comm. of Wis.*, 161 Wis. 530, 154 N. W. 844, 13 N. C. C. A. 200; *Salvador v. Interborough Rapid Transit Co.*, 1 N. Y. St. Ind. Bull. 10, 5 N. Y. St. Dep. Rep. 438, (1915), 13 N. C. C. A. 203.

60. *Hall v. Ind. Comm. of Wis.*, 166 Wis. 364, 162 N. W. 312, 16 N. C. C. A. 77; *Williams v. Williams*, 46 Wis. 464, 13 N. C. C. A. 202; *Lanham v. Lanham*, 136 Wis. 360; *Armstrong v. Ind. Comm.* 161 Wis. 530.

61. *Sweet v. Sherwood Ice Co.*, 40 R. I. 203, 100 Atl. 316, 16 N. C. C. A. 85.

62. *James Black D. G. Co. v. Iowa Indus. Comm.*,—Iowa, (1919), 173 N. W. 23, 4 W. C. L. J. 379.

A deserted wife, who, subsequent to the desertion, has been guilty of adultery, is not a dependent of her husband within the meaning of the Maine Act; desertion under the Act having its usual meaning in connection with marital relations.⁶³

A wife who deserts her husband, or has been deserted by her husband, and who does not receive support from him, is not a dependent.⁶⁴

But where the wife was actually destitute of funds, it was held that she was dependent upon her husband's earnings, even though he had deserted her and did not support her.⁶⁵

Children deserted by their father, and not supported by him, are not presumed to be dependent.⁶⁶

Desertion and non-support of children by a father for three years, followed by an agreement to contribute from his earnings, with which he was prevented from complying, because of the accident, makes dependency a question of fact for the arbitration committee to decide.⁶⁷

Where a workman deserts his wife and a minor child, whom he has taken into his family but never adopted, and he does not contribute to their support for several months prior to his death, the minor child is not entitled to prevail in a claim of dependency.⁶⁸

§ 378. **Marriage or Remarriage of Dependent.**—Where there is no provision made in the act to the effect that remarriage of a deceased workmen's dependent widow will terminate further

63. Scott's Case, 117 Me. 436, 104 Atl. 794, 3 W. C. L. J. 49.

64. Batista v. West Jersey & Seashore R. Co., 85 N. J. L. 801, 88 Atl. 954, 4 N. C. C. A. 781; Devlin v. Pelaw-Main, Colliery Co., 5 B. W. C. C. 349, (1912), W. C. R. 225; Lindsay v. M'Glashen & Sons Ltd., 1 B. W. C. C. 85, 6 N. C. C. A. 250; Miller v. Pub. Serv. R. Co., 84 N. J. L. 174, 85 Atl. 1030; Polled v. Great Western Ry. Co., (No. 2), (1912), 5 B. W. C. C. 620 C. A.

65. Sneddon v. Robert Addie & Sons' Collieries, Ltd., 12 Sc. L. T. 229, 6 N. C. C. A. 250.

66. Lee v. Bessie, (1912), W. C. & Ins. R. 57, 6 N. C. C. A. 259.

67. Dobbie v. Egypt & Levant S. S. Co., (1913), W. C. & Ins. Rep. 75, 6 N. C. C. A. 259.

68. Mahoney v. Gamble Desmond Co., 90 Conn. 255, 96 Atl. 1025.

payments, remarriage will not affect the payment of benefits, and an award is absolute and not conditional.⁶⁹

The ascertainment of dependency is made as of the time of the accident, therefore, in the absence of statutory provisions to the contrary, subsequent intervening events will not deprive the dependent of compensation. Remarriage after compensation has been awarded, but before termination of payments, does not deprive the party from receiving further payments under the allowance.⁷⁰

Where the statute does not specifically mention marriage as a condition of terminating payments, the marriage of a dependent sister does not disentitle her to further payments.⁷¹

Where the New York State Industrial Commission ordered the employer to pay to the state insurance fund the commuted value of an award to the widow and children of a deceased employee, and the original award directed payment to the widow during widowhood, and to the children until they arrived at the age of 18 years, the court, in reversing the award, said: "The order appealed from which required the deposit in the state fund by the employer and self insurer of the money to meet the future payments of an award was properly reversed by the appellate division, for the reason that section 27 of the Workmen's Compensation Law (Consol. Laws, c. 67), which requires such deposit, does not apply to an award made to a widow. It does not contemplate and fails to provide for weighing or determining the contingency of the widow's remarriage—which would bring about a cessation of the payments to her."⁷²

69. *Newton v. Rhode Island Co.*, — R. I. —, 105 Atl. 363, (1919). 3 W. C. L. J. 527; *Wangler Boiler Co. v. Indus. Comm.*, 287 Ill. 118, 122 N. E. 366. 3 W. C. L. J. 617; *Adleman v. Ocean Acc. & Guar. Co.*, 130, Md. 572, 101 Atl. 529. See *Utah Act 1921 Am.*, § 3140- (5).

70. *Bott's Case*, 230 Mass. 152, 119 N. E. 755, 16 N. C. C. A. 864; *Hanson v. Brann & Stewart Co.*, 90 N. J. L. 444, 103 Atl. 696, 16 N. C. C. A. 864; The New Jersey's Act has been amended so as to terminate payments in the event of remarriage.

71. *Adleman v. Ocean Accident and Guarantee Corp.*, 130 Md. 572, 101 Atl. 529, 16 N. C. C. A. 865, A 1 W. C. L. J. 738.

72. *Adams v. New York & O. W. R. Co.*, 220 N. Y. 579, 114 N. E. 1046, 16 N. C. C. A. 866.

A widow adopted a child subsequent to the death of her husband, and later remarried. Upon remarriage a claim was made on behalf of the child for a share of the compensation awarded to the widow. The court, in denying compensation, said: "The whole purpose of the compensation Act was to make pecuniary provision for those having lawful claims upon the workman, particularly his widow and his children. The petitioner in the case at bar was not the child of the deceased, nor of his widow. She made him her child after the death of the decedent, but that fact cannot bring him within the statute. The statute must be construed as having reference and application to conditions existing at the time of the death of the workman, and not to relationships created by the widow after his death. And though the statute might be construed to include children of the widow by a former marriage, who at the time of his death were living with and dependent upon the workman for support, it cannot well be construed to include children coming into an adopted relationship to the widow after his death." ⁷³

Where a husband instituted proceedings during his lifetime against his employer, his wife, not being a party in interest, would not be affected by the outcome of such proceeding, except that there might be a possible deduction of her claim for payments actually made him.⁷⁴

§ 379. Rights of Dependents Independent of the Right of Deceased and Others.—A dependent's claim to compensation arises upon the death of the workman, and is independent of the claim to compensation by the workman.⁷⁵ A settlement by the employer

73. *State ex rel. Varchmin v. District Court of Ramsey Co.*, 133 Minn. 265, 158 N. W. 250, 13 N. C. C. A. 277.

74. *Curtis v. Slater Const. Co.*, 202 Mich. 673, 168 N. W. 958, 2 W. C. L. J. 909; *Giggndelle v. Piedmont and Georges Creek Coal Co.*, —, Md. App.—, (1920), 111 Atl. 135, 6 W. C. L. J. 535.

75. *Nesland v. Eddy*, 131 Minn. 62, 154 N. W. 661. This case finds support in *Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357, 104 Am. St. Rep. 665; *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *American R. Co. v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456.

with the workman does not bar the dependent's right to compensation.⁷⁶ Nor does a release by the workman bar dependents right to compensation.⁷⁷ A release by the widow will not bar the claim of the personal representative for the benefit of minor children.⁷⁸ Financial benefits accruing to dependents upon the death of a workman will not affect the right to compensation.⁷⁹

The fact that an employee received compensation for a brief period before his death does not relieve the insurer of the statutory requirement of the New York Act to "pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of \$100.00." In case of death the decedent would not be a person entitled to compensation.⁸⁰

In holding that a mother could institute proceedings to recover compensation, despite the fact that the widow elected to sue a third person, and while such suit was pending, the court said: "If in the instant case the widow succeeds in her action against the third party, her success will inure to the benefit of the insurer so far as she and those represented by her action against the third party are concerned. But, whether she succeeds or fails, the result will be the same to the insurer, so far as the dependent mother is concerned. Within the limitations of said section 16, subdivision 4, the liability of the insurer to the mother is entirely independent of the claim of the widow, and will remain the same independently of the result of the action instituted by her against

76. *King v. Viscoloid Co.*, 219 Mass. 420, 106 N. E. 988; *Williams v. Vauxhall Colliery Co. Ltd.*, (1908), 9 W. C. C. 120 C. A.; *Howell v. Bradford & Co.*, (1911), 4 B. W. C. C. 203 C. A.

77. *In re Cripp*, 216 Mass. 586, 104 N. E. 565 Ann. Cas. 1915B, 828.

78. *West Jersey Trust Co. v. Phil. & Read. R. R. Co.*, 28 N. J. L. 102, 95 Atl. 753; *Satterfield v. Wahlquist*, — Penn. —, 111 Atl. 253, 6 W. C. L. J. 579.

79. *State ex rel. Crookston Lbr. Co. v. District Ct.*, 131 Minn. 27, 154 N. W. 509; *Pryce v. Penrikyber Nav. Colliery Co.*, (1902), 4 W. C. C. 115, C. A.

80. *Stempfler v. J. Rheinfrank & Co.*, 190 App. Div. 163, 179 N. Y. S. 659, (1919), 5 W. C. L. J. 573; *Milwaukee Coke & Gas. Co. v. Indus. Comm.*, 160 Wis. 247, 151 N. W. 245, 9 N. C. C. A. 597; *In re Nicholas*, 104 N. E. 566, 217 Mass. 3, 4 N. C. C. A. 546.

the third party. The amount of the payment to the dependent mother can be fixed definitely and accurately, and in no respect depends on either the fact or the amount of the recovery in the action of the widow against the third party."⁸¹

Money paid to an employee under a voluntary agreement between the employee and employer, cannot be deducted from a death benefit, for such payment does not come within the scope of the statute allowing advancements to be deducted.⁸²

§ 380. Death of Beneficiaries or of an Employee Before the Period for Which an Award Has Been Made Has Elapsed.—

Some acts expressly provide for termination of payments on the death of the beneficiary or upon contingencies, such as remarriage of a dependent widow or widower or cessation of dependency, other acts are so construed.⁸³ A few states provide that upon death or remarriage of a dependent widow or widower during the term of benefit payments, subsequent payments shall go to other dependents, if any,⁸⁴ while other acts are construed or expressly provide that upon the death of dependents the right to compensation which is a vested right passes to the executor or administrator.⁸⁵ But in the absence of some provision vesting in some

81. *In re Cahill*, 159 N. Y. Supp. 1060, 16 N. C. C. A. 181.

82. *Jackson v. Berlin Const. Co.*, 93 Conn. 155, 105 Atl. 326, 3 W. C. L. J. 224.

83. *In re Murphy*, 224 Mass. 592, 113 N. E. 283, 13 N. C. C. A. 717; *Ledford v. Caspar Lbr. Co.*, 2 Cal. I. A. C. 679, 13 N. C. C. A. 723; *Corcoran v. Farrel Fdry. Co.*, 1 Conn. C. D. 42, 13 N. C. C. A. 721; *Lahoma Oil Co. v. Indus. Comm.*, — Okla. —, 175 Pac. 836. The Illinois act as amended in 1919 provides that compensation is extinguished by death if there are no dependents.

84. *Matecny v. Vierling Steel Wks.*, 187 Ill. App. 448, 13 N. C. C. A. 715; *Hughes v. L. P. Degen Belting Co.*, 2 Cal. I. A. C. 569, 13 N. C. C. A. 729; *Judson v. Andrews & Peck Co.*, 1 Conn. C. D. 54, 13 N. C. C. A. 731; *In re Bartoni*, 225 Mass. 349, 114 N. E. 663; *McNicols Case*, 215 Mass. 497.

85. *United Collieries Ltd. v. Simpson or Hendry*, (1909), A. C. 383, 6 N. C. C. A. 287; *Darlington v. Roscoe & Sons*, (1907), 1 K. B. 219, 9 W. C. C. 1; *State ex rel. Munding v. Indus. Comm. of Ohio*, 92 Ohio St. 434, 111 N. E. 299, 13 N. C. C. A. 713; *Swift & Co. v. Indus. Comm.*,

survivor the right to compensation payments, the general rule is that the death terminates the compensation.⁸⁶ And the personal representative is entitled only to the amount of compensation due at the time of the death of the injured employee.⁸⁷

Where a widow, who was wholly dependent upon and the sole dependent of the deceased, died before compensation was made, and the administrator of deceased's estate sued for compensation, the court held "The action was prosecuted by the right party," and that "the right to full amount of compensation allowed by subdivision 1, of sec. 5905, of the general statutes of Kansas, 1915, vested on the death of the workman, and was recoverable, notwithstanding the provision of subdivision 4 relating to discontinuance of compensation on marriage of a dependent and on arrival of a dependent at the age of independency."⁸⁸

An award made payable to the deceased's widow and in case of her death to the dependent children was held proper in a case where the children were equally dependent with the widow.⁸⁹

In a Massachusetts case the court said that the decree of award to the widow of the deceased servant should contain a clause stating

288 Ill. 132, 123 N. E. 267, 4 W. C. L. J. 163; *Wangler Boiler & Sheet Metal Works v. Indus. Comm.*, 287 Ill. 118, 122 N. E. 366; *Hansen v. Braun & Stewart Co.*, 90 N. J. L. 444, 103 Atl. 696; *Friedman Mfg. Co. v. Indus. Comm.*, 284 Ill. 554, 120 N. E. 460; *In re Towle*, Op. Sol. Dep. C. & L. 565.

86. *Ray v. Industrial Ins. Comm.*, — Wash. —, 168 Pac. 1121; *Wozneak v. Buffalo Gas Co.*, 175 App. Div. 268, 161 N. Y. Supp. 675; *Lahoma Oil Co. v. Indus. Comm. of Okla.*, — Okla. —, 175 Pac. 836; *U. S. Fidelity Guaranty Co. v. Salser*, — Tex. Civ. App. —, 224, S. W. 557, 6 W. C. L. J. 717.

87. *In re Nichols*, — Mass. —, 104 N. E. 566; *In re Bartoni*, 114 N. E. 663, 225 Mass. 349; *In re Murphy*, — Mass. —, 113 N. E. 283; *In re Burns*, 218 Mass. 8, 105 N. E. 601, 5 N. C. C. A. 635; *Erie Ry. Co. v. Gallaway*, — N. J. —, 102 Atl. 6; *Jackson v. Berlin Construction Co.*, — Conn. —, 105, Atl. 326; *Poccardi v. Ott*, — W. Va. —, 104 S. E. 54, 6 W. C. L. J. 721; *East St. Louis Board of Education v. Indus. Comm.*, — Ill. —, (1921), 131 N. E. 123.

88. *Smith v. Kaw Boiler Works*, 104 Kan. 591, 180 Pac. 259, 4 W. C. L. J. 87.

89. *Zoldatz v. Detroit Auto Specialty Co.*, — Mich. —, (1919), 172 N. W. 549, 4 W. C. L. J. 259.

in express terms that in case of death of the dependent before the expiration of the period of payment the weekly payments are to cease, but the payments do cease regardless of the omission of such clause.⁹⁰

Where a deceased employee's dependents were two minor children, and one of the children died after the father's death but before an award was made, and an award by the industrial commission, ordering the share of the deceased child to be paid to the administrator of the deceased employee was upheld because the court held that an insurer cannot litigate by appeal the proportions of the division of a payment among those claiming to be dependent upon the deceased employee, when the dependents are satisfied, and do not appeal and the insurer cannot, by any possibility, affect its pecuniary responsibility.⁹¹

Subsequent insanity does not deprive an employee of compensation due him.⁹²

Under the Colorado statute distributing lapsed awards and a subsection of the statute which limits the amount of an award to nonresidents to one third of the amount allowed to resident dependents, but not to exceed \$1000, an award of \$2,500 for and employee's death was apportioned so that a dependent son, a resident, was awarded one third, and the widow and daughter, nonresident dependents, were awarded jointly one third of the remainder. Upon the lapsing of the son's share at his death, and the widow's share upon her remarriage the daughter was entitled to an award of \$1000 less the original award to her, and she was not limited to one third of the unpaid sum.⁹³

90. *In re Derinza*, 229 Mass. 435, 118 N. E. 942, 1 W. C. L. J. 795, 16 N. C. C. A. 87; *In re Bartoni*, 225 Mass. 349, L. R. A. 1917E, 765, 114 N. E. 663, 16 N. C. C. A. 88.

91. *In re Janes*, 217 Mass. 192, 4 N. C. C. A. 552, 13 N. C. C. A. 720.

92. *In re Walsh*. — Mass. —, 116 N. E. 496, 15 N. C. C. A. 345; *In re Colon*, M. Linton, 3rd A. R. U. S. C. C. 131; *Ward v. Heth Bros.*, — Mich. —, (1920), 180 N. W. 245.

93. *Indus. Comm. of Colo. v. Colo. Fuel & Iron Co.* — Colo. —, 1921, 195 Pac. 114.

Where an employee recovered a lump sum judgment and upon his death, before satisfaction, in holding that it might be revived in the name of the administrator, the court said: "The argument against the revivor being allowed in the name of the administratrix is based upon the contention that:

"Under the compensation law, the right to compensation and any judgment for compensation abates upon the death of the employee, and does not survive to his heirs or representatives.

"In support of this contention it is argued that compensation, where death results from an injury to a workman, is allowed only to his dependents, and therefore his heirs as such, or his executor or administrator, have nothing to do with it. That situation, however, is obviously not fully analogous to the one here presented, where a judgment was rendered in favor of the workman. It has been held that a judgment under the Compensation Act providing for periodical payments to an injured workman, although subject to commutation, does not survive the plaintiff's death, *Wozneak v. Buffalo Gas Co.*, 175 App. Div. 268, 161 N. Y. Supp. 675.

"In the case cited the trial court had decided to the contrary, and two of the five appellate judges dissented from the reversal. That decision, however, if accepted as sound, would not control here. In the present case the plaintiff had obtained an absolute personal judgment requiring the immediate payment of a fixed amount. It was the legal duty of the defendant to pay it at once, unless a stay should be procured pending an appeal. If payment had been made, the money would have been wholly at the disposal of the plaintiff. If the final result is an affirmance, it will amount to an adjudication that the rights of the parties shall remain as fixed at the time the judgment was rendered. The defendant gains no immunity from the fact of his having taken an appeal which is ultimately determined not to have been well founded.

"The final argument against the right of revivor is that because the judgment is not assignable it does not survive the death of the plaintiff. It is true that, as a rule, causes of action which are not assignable do not survive. 1 C. J. 175, 176. But a judgment based on a nonsurviving cause of action ordinarily does survive (1 C. J. 169), and does so in this state notwithstanding the penden-

cy of an appeal (*Powers v. Sumbler*, 83 Kan. 1, 110 Pac. 97). Moreover, while as a rule causes of action which are not assignable do not survive, this is because of qualities that inhere in the nature of the right. Where the statute for some special purpose, as the protection of a claimant against improvidence, forbids assignment, nonsurvivability does not necessarily result therefrom. The new government war savings certificates are expressly made not transferable, but it will hardly be doubted that the title would pass to the heirs or personal representatives of the owners upon his death. We hold that if the assignment was invalid the revivor was properly made in the name of the administratrix."⁹⁴

§ 381. **Absence of Dependents.**—Under sec. 15, sub'd. 7, of the New York Workmen's Compensation Law, the insurance carrier may pay the state treasurer \$100.00 where the injury results in the death of an employee who is without surviving dependents, though the employee himself before death received compensation for a brief period; for in case of death, he would not be a person entitled to compensation.⁹⁵

The State alone can object to the failure of the court to award \$750.00 to the state treasurer, in case of a finding that there were no dependents of the deceased workman, under the Connecticut Act.⁹⁶

§ 382. **Inheriting from Estate of Deceased or Receiving Benefits from Other Sources.**—As the question of dependency is to be determined as of the time of the injury or death of deceased, money or other property coming to the claimant from the deceased's estate has no bearing upon the question.⁹⁷

94. *Monson v. Battelle*, — Kan. —, 170 Pac. 801, 1 W. C. L. J. 770.

95. *Stempfler v. J. Rheinfrank & Co.*, 190 App. Div. 163, 179 N. Y. S. 659, (1919), 5 W. C. L. J. 573.

96. *Blanton v. Wheeler & Howes Co.*, 91 Conn. 226, 99 Atl. 494.

97. *State ex rel. v. District Court of Beltrami County*, 131 Minn. 27, 13 N. C. C. A. 555; *Pryce v. Penrikyber Navigation Col. Co.*, (1902), 1 K. B. 221, 4 W. C. C. 115, 85 L. T. 477, 71 L. J. K. B. 192, 50 W. R. 197, 66 J. P. 198, 6 N. C. C. A. 272; *Kenney's Case*, 222 Mass. 401, 111 N. E. 47.

The fact that a mother had made a will in favor of her deceased son, who had contributed to her support, is not material in determining her claim to the benefit provided by the act, in the absence of evidence that the will was the result of an agreement.⁹⁸

Where a son contributed to the support of his parents within four years it is immaterial under the Illinois Act that the parents were not dependent upon him.⁹⁹

Dependency of a girl upon her grandfather for whose death she claimed compensation, being determinable by the conditions which existed at the time of the accident, would not be affected by the fact that, at the time of the hearing, she was earning some wages, or that the mother as a matter of spite to the grandmother, was offering to take care of her.¹

The fact that a mother had \$300.00 or \$400.00 in a bank drawing 4% interest, does not bar her of a right under the Workmen's Compensation Act.²

The Supreme Court of Kansas has held that the fact that the parents of deceased had ample property and income to sustain them, if properly used, was immaterial, if they actually depended upon the son's contributions to maintain them in the manner of living they had chosen.³

"In determining compensation under the statute it is immaterial whether the claimant inherited anything from the estate of the employee. Under the General Statute of Minnesota, 1913, Sec. 8208, the minimum compensation to a person wholly dependent on the deceased employee is \$6.00 a week for 300 weeks."⁴

98. *Miss. River Power Co. v. Indus. Comm.*, 289 Ill. 353, 124 N. E. 552, 5 W. C. L. J. 50.

99. *Humphrey v. Indus. Comm.*, 285 Ill. 372, 120 N. E. 816, 3 W. C. L. J. 102.

1. *In re Yeople*, *In re John B. Rose Co.*, *In re Travelers' Ins. Co.*, 182 App. Div. 438, 169 N. Y. S. 584, 1 W. C. L. J. 1135, 16 N. C. C. A. 148.

2. *Parson v. Murphy*, 101 Neb. 542, 163 N. W. 847, 16 N. C. C. A. 174.

3. *Fennimore v. Pittsburg-Scammon Coal Co.*, 100 Kan. 372, 164 Pac. 265, 16 N. C. C. A. 176.

4. *State ex rel. Crookston Lbr. Co. v. District Court of Beltrami Co.*, 131 Minn. 27, 13 N. C. C. A. 555, 154 N. W. 509.

Mere gratuitous pittances-given by a sister and an aunt are not sufficient to deprive a mother and sister, otherwise totally dependent upon deceased, of an award for total dependency.⁵

Where the parents were receiving a pension in addition to the son's contributions, a finding of partial dependency was in accordance with the facts in the case.⁶

The fact that the dependents draw benefits from a fireman's relief association, does not affect their right to the full amount of compensation under the Minnesota Act.⁷

Section 204 of the Pennsylvania Act reads: "Receipt of benefits from any association, society, or fund shall not bar the recovery of damages, by action at law, nor the recovery of compensation under article 3 hereof, and any release given in consideration of such benefits shall be void."⁸

§ 383. Claim for Compensation by Personal Representative or Administrator.—Under the Illinois Workmen's Compensation Act, Sec. 19, it is not necessary that the executor or administrator of a servant, killed in the course of his employment, file a claim for compensation, but it is sufficient if the petition is filed by the parties entitled to compensation.⁹

Where a widow, who was wholly dependent upon and the sole dependent of deceased, died and the administrator of the estate of the deceased workman sued for compensation, the court in construing the Kansas Act held that, the action was prosecuted by the proper party, and that the right to the full amount of compensa-

5. *Petrozino v. Amer. Mut. Liab. Assn.*, 219 Mass. 498, 107 N. E. 370, 9 N. C. C. A. 594.

6. *Binkley v. Western Pipe & S. Co.*, (Cal.), 1 A. C. 1 Nat. Comp. Jour., (1914), 6 N. C. C. A. 272; *Johnson v. Mountain Commercial Co.*, 1 Cal. I. A. C. D. (1914), 11, 6 N. C. C. A. 272; *Ress v. Youngstown Sheet & Tube Co.*, Ohio Ind. Com., (1914), 6 N. C. C. A. 273.

7. *State ex rel. City of Duluth v. District Court of St. Louis Co.*, 134 Minn. 26, 158 N. W. 791.

8. *Decker v. Mohawk Min. Co.*, 265 Pa. 507, 109 Atl. 275, 5 W. C. L. J. 889.

9. *Mississippi River Power Co. v. Indus. Comm.*, 289 Ill. 353, 124 N. E. 552, 5 W. C. L. J. 50.

tion allowed by subdivision 1, of section 5905, General Statutes of 1915, vested on the death of the workman, and was recoverable, notwithstanding the provision of subdivision 4 relating to discontinuance of compensation on marriage of a dependent and on arrival of a dependent at the age of independency." ¹⁰

In proceedings for compensation under the Massachusetts Workmen's Compensation Act, it has been said: "The administrator of the widow of a deceased employee is entitled to the weekly payment provided by part 2, section 6, of the act, 'from the date of the injury' until the time of the decease of the widow. In this connection it is of no consequence that the widow deceased before any payment was made to her. No compensation had been paid to her because of pending negotiations as to settlement for a lump sum. She was herself conclusively presumed to be dependent upon the employee, and the obligation rested strongly on her to support their minor children." ¹¹

Under the New Jersey Workmen's Compensation Act, the proceedings for compensation should be brought by the executor or administrator, and in the absence of such persons then the person entitled to administration. ¹²

Where the father of a deceased employee lived in Austria, and instituted proceedings by an attorney in fact, who bore no relation to the parent, and who acted upon the authority of an unauthenticated letter received by him from the father, the court held that this letter constituted no legal authority for his action taken in filing the application. ¹³

The administrator of a deceased employee has a right to prosecute an application for compensation and collect any award made.

10. *Smith v. Kaw Boiler Works*, 104 Kan. 591, (1919), 180 Pac. 259, 4 W. C. L. J. 87.

11. *Coakley's Case*, 216 Mass. 71, 102 N. E. 930, Ann. Cas. 1915A 867; *In re Bartoni*, 225 Mass. 349, L. R. A. 1917E 765, 114 N. E. 663, (1916), 16 N. C. C. A. 88.

12. *Connors v. Public Service Electric Co.*, 89 N. J. L. 99, 97 Atl. 793. 16 N. C. C. A. 802; *Coster v. Thompson Hotel Co.*, 102 Neb. 585, 168 N. W. 191, 16 N. C. C. A. 803.

13. *Western Indemnity Co. v. Indus. Comm. of Cal.*, 35 Cal. App. 104, 169 Pac. 261, 16 N. C. C. A. 804.

The employer is protected by the statutory requirement that the administrator shall relieve the employer of all obligation as to distribution of the award.¹⁴

Where a deceased employee has accepted the provisions of the compensation act, his personal representative cannot maintain an action under the death act for damages for his death, even though the only dependents left surviving him were aliens not residents of the United States.¹⁵

Where the dependent of a deceased workman dies without making a claim, the legal personal representative of the dependent is entitled to compensation unless the act expressly otherwise provides.¹⁶

So where a deceased workman left two minor children, and one of them died before the award was made, the share of the deceased child was ordered paid to his administrator.¹⁷

On the other hand, the administrator of a dependent mother's estate is not entitled to the remainder of the payments upon the death of the mother, who was the sole dependent. The payments terminate.¹⁸

Under the Ohio Act, an award to a dependent is a vested right, and upon the death of the dependent before final settlement is made the personal representative is entitled to the balance remaining unpaid.¹⁹

Compensation accruing to a widow between the employee's death and her death may be recovered by her personal representative as

14. *G. H. Hammond Co. v. Indus. Comm.*, 288 Ill. 262, 123 N. E. 384, 4 W. C. L. J. 176.

15. *Gregutis v. Waclark Wire Works*, 86 N. J. L. 610, 92 Atl. 354, 9 N. C. C. A. 594.

16. *United Collieries Lim. v. Simpson*, 78 L. J. P. C. 129, (1909), A. C. 383, 101 L. T. 129, 25, T. L. R. 678, 53 Sol. Jo. 630, (1909), S. C. (H. L.) 19, 40 Sc. L. R. 780, (1909), S. L. T. 47, 2 B. W. C. C. 308, 6 N. C. C. A. 287; *Darlington v. Roscoe & Sons*, 76 L. J. K. B. 371, (1907), 1 K. B. 219, 96 L. T. 179, 23 T. L. R. 167, 61 Sol. Jo. 130, 9 W. C. C. 1, 6 N. C. C. A. 287.

17. *In re Janes*, 217 Mass. 192, 104 N. E. 556, 4 N. C. C. A. 552.

18. *Matecny v. Vierling Steel Works*, 187 Ill. App. 448, 6 N. C. C. A. 287.

19. *State v. Indus. Comm.*, 92 Ohio St. 434, 111 N. E. 299.

part of her estate, and does not under the Federal Act accrue to their children as beneficiaries.²⁰

Where compensation is awarded to an administrator in a proceeding on behalf of the dependents, the distribution is to be made by him pursuant to the orders of the court which appointed him. Either an administrator, a beneficiary, or an employer may file a petition for the adjustment of a claim under the Illinois Act.²¹

§ 384. **Dependent of More Than One Workman.**—One person may be dependent upon more than one workman, and where a mother was dependent upon her husband and two sons, who were all killed at once, in a mine disaster, the rule laid down was that a dependent of more than one workman may recover more than one maximum amount allowed for the death of one workman.²²

In construing the Pennsylvania Act on this point the Supreme court of that state said: "May children who are now receiving compensation for the death of their natural father receive additional and concurrent compensation through the death of their stepfather? The Legislature has authority to determine the various classes of persons who are entitled to compensation, as dependents, upon the injury or death of an employee, and the amount to be paid such dependents. When it has so determined, the courts cannot change or amend either the classifications or the amount to be paid. In Section 307 of the Workmen's Compensation Act (Acts 1915, p. 736): 'The terms "child" and "children" shall include stepchildren and adopted children, and children to whom the employee stood *in loco parentis*, if members of the decedent's household at the time of his death.' The referee finds that decedent not only stood *in loco parentis* to these children, who were members of his household at the time of his death, but that they were also dependent upon him. This conclusion would seem to fix

20. In re Towle, Op. Sol. Dept. C. & L. 565.

21. National Zinc Co. v. Indus. Comm., 292 Ill. 598, 127 N. E. 135, 6 W. C. L. J. 21.

22. Hodgson v. Owners of West Stanley Colliery, (1910), 102 L. T. 194, A. C. (H. L.) 229, 3 B. W. C. C. 260, 6 N. C. C. A. 267; McLean v. Moss Bay H. I. & S. Co., Ltd., (1910), A. C. 229, 3 B. W. C. C. 402.

their right to compensation through the stepfather. We find nothing in the act that prohibits this dual compensation. Moreover, it would seem to be expressly permitted. Section 204 reads: That 'the receipt of benefits from any association, society, or fund shall not bar the recovery of damages by action at law, nor the recovery of compensation under article three hereof; and any release executed in consideration of such benefits shall be void.' " 23

§ 385. **Submitting to Operation.**—Before compensation can be denied to a dependent, suffering from physical disability, for a period in excess of that reasonably required to effect a cure, because of his refusal to submit to a surgical operation for hernia, there must be an explicit finding of the probable favorable result of such an operation, if performed, and an unreasonable refusal to submit thereto. A finding that the claimant's condition "called for and now calls for an operation," is insufficient to justify such a denial.²⁴

§ 386. **Estopped to Dispute Claim of Dependents After Deceased's Death.**—An insurer cannot be heard to claim that the award was to the deceased as sole dependent of the deceased employee, where the employer and insurer assumed before the arbitration committee that the claim of the deceased servant's father was made upon behalf of himself and family, and the award should be modified to include the widow and minor children upon petition filed after the father's death.²⁵

Where an employer has paid compensation up to the time of the death of a workman under a registered agreement, he is not estopped to dispute the cause of the workman's death or show that it did not result from the injury.²⁶

23. *Decker v. Mohawk Mining Co.*, 265 Pa. 507, 1920, 109 Atl. 275, 5 W. C. L. J. 889.

24. *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025, 13 N. C. C. A. 315.

Note: See § 490 post.

25. *Byle v. Grand Rapids Blowpipe & Dust Arrester Co.* — Mich. — (1920), 175 N. W. 416, 5 W. C. L. J. 402.

26. *Cleverley & Others v. Gas Light & Coke Co.*, 1 B. W. C. C. 82.

§ 387. Necessity of Administering Upon Estate of Workman.

—The taking out of letters of administration on the estate of a deceased workman is not necessary under the British Act, on the part of one claiming as a dependent.²⁷ In the United States many of the states dispense with administration as to workmen's compensation death benefits, and the statutes of the particular state must therefore be consulted.

§ 388. Division of Compensation Between Dependents—Double Compensation.—Under the Workmen's Compensation Acts a number of persons bearing different relationship to the deceased, may be concurrently entitled to compensation as dependents.

So an award to a widow does not preclude an award to minor children of decedent.²⁸ And a father partially dependent upon his son is entitled to his proportionate share of the death benefit, even though the deceased son left a totally dependent widow.²⁹

Where a deceased workman leaves a widow and minor children, an award under the Pennsylvania Act should be made in favor of the children, to begin after the award to the widow ceases, and to continue until each of the children reach the age of 16 years.³⁰

An apportionment of the award between the deceased's widow, his son by a former wife, and her child by a former husband, was properly apportioned where the amount due his son was paid to a guardian and the amount due his widow and her child was paid to the widow.³¹

Assuming that a wife living apart from the employee is, under the California Act, conclusively presumed to be dependent upon

27. *Clatworthy v. R. & H. Green*, (1922), 86 L. T. 702, 4 W. C. C. 152.

28. *Catlin v. Pickett & Co.*, 262 Pa. 351, 105 Atl. 503; *Wolford v. Geisel Moving & Storage Co.*, 262 Pa. 454, (1919), 105 Atl. 831, 3 W. C. L. J. 798.

29. *Penn v. Penn*, 188 Ky. 228, (1919), 209 S. W. 53, 3 W. C. L. J. 634.

30. *Irvin v. Frost & Co.*, 262 Pa. 354, 105 Atl., 504, 3 W. C. L. J. 526; *Zoladtz v. Detroit Auto Specialty Co.*, 206 Mich. 349, (1919), 172 N. W. 549; *Catlin v. Pickett*, 261 Pa. 351, 105 Atl. 503.

31. *Holmberg's Case*, 231 Mass. 144, 120 N. E. 353, 2 W. C. L. J. 899.

him for support, still where there were also children dependent upon him, the commission had power to award the compensation in proportion to their respective needs, and in such manner as might be just and equitable, even to the total exclusion of the wife.³²

Where a deceased leaves two daughters dependent upon him, an equal division of the death benefit is proper, where the evidence tends to show that both daughters were partially dependent upon the contributions of the father to the family.³³

Where the deceased left a widow and a minor son dependent upon him, and by the terms of the award the son was to be given into the custody of the grandfather, it was held under the British Act that the compensation should be apportioned between the dependents.³⁴

An award to the mother of deceased is proper under the Indiana Act, even though brothers and sisters of the deceased were supported out of the common fund; for the son was under no obligation to support his brothers and sisters.³⁵

Where an award was made under the Massachusetts Act to parents jointly, the court, in reversing the award, said: "In this case the board made no finding as to the relative extent of the dependency; and the difficulty of doing so is apparent where the contributions may have been made for the joint benefit of both parents. The claimants, however are willing to have the entire amount awarded to the father, who was the head of the family; and to rely upon having the case reopened for further hearing if the father should die during the period of compensation, leaving the mother surviving. * * * In our opinion the present award is not in compliance with the statute. If it is to be made to both parents,

32. *Perry v. Indus. Acc. Comm.*, 177 Cal. 706, 169 Pac. 353, 1 W. C. L. J. 474, 16 N. C. C. A. 83.

33. *In re Osterbrink*, 229 Mass. 407, 118 N. E. 657, 1 W. C. L. J. 814, 16 N. C. C. A. 148.

34. *Fleming v. Roburite Co., Ltd.*, (1917), W. C. & Ins. Rep. 82, 16 N. C. C. A. 156.

35. *People's Hdw. Co. v. Croke*, (Ind. App.), 118 N. E. 314, 16 N. C. C. A. 179; *Riggs v. Lehigh Portland Cement Co.*, — Ind. App. —, (1921), 131 N. E. 231.

the relative extent of their dependency individually must be found."³⁶

But under the New York Act, it was held that, for an accident happening prior to the amendment of 1916, an award to the parents jointly was proper.³⁷

Where an award was made to a father for the death of his son, it was contended that the award should be conditioned upon the fact that the mother filed a waiver to any claim growing out of the same circumstances. Overruling this contention the court said: "In this contention we think that the appellant has overlooked the fact that the claim for compensation is made in the name of both Albert and Augusta Buhse, father and mother of the decedent, and the evidence clearly discloses that such contributions as the decedent made were made alike for the benefit of his father and mother. The proceedings negative the possibility of a second claim being made against respondent by Augusta, the mother, she being a party to the present proceedings."³⁸

Where separate awards were made to a daughter, father, and mother, there was no merit in the contention that, since the parents were legally obligated to support the daughter, the award to the parents must include any benefit to which she might otherwise be entitled, and hence that an award to her was granting double compensation, as the daughter was dependent upon the son for support she was entitled to a separate award.³⁹

Under the provisions of an act allowing compensation to alien dependents and limiting the dependents in any foreign country to the surviving wife and children, and in the absence of these to father, mother or grandparents, which the deceased has supported for a year prior to the accident, an award of 25 per cent to each parent was double compensation, as the statute contemplated 25 per

36. *In re Pagnoni*, 230 Mass. 9, 118 N. E. 948, 16 N. C. C. A. 187.

37. *Moran v. Rodgers & Hagerty, Inc.*, 180 App. Div. 821, 169 N. Y. Supp. 410, 16 N. C. C. A. 188.

38. *Buhse v. Whitehead & Kales Iron Works*, 194 Mich. 413, 116 N. W. 557.

39. *Walz v. Holbrook, Cabot and Rollins Corp.*, 170 N. Y. App. Div. 6, 13 N. C. C. A. 464, 155 N. Y. S. 703.

cent to both parents, and the award to the mother should be stricken out.⁴⁰

The commission is not required, under the Illinois Act, to apportion compensation between a widow and a child, where there is no contest as to who should receive the benefit of the award, and the widow is the administratrix of the deceased employee. The commission has fulfilled its obligation upon making payments to the administratrix. Nor does the commission have to determine how much or what proportion every member of the class shall receive.⁴¹

An award of compensation in a lump sum by an Industrial Commission was sufficient, and it was not obliged to declare the proportion of the award of each of the beneficiaries. Such distribution should be made by the court appointing the administratrix.⁴²

The Texas Act, providing that beneficiaries in case of death will take by descent, means descent relating to community property, and not *per capita*, as provided by law of descent relating to separate property.⁴³

Where an employee leaves a dependent mother, the entire award should be allotted to her, even though there are brothers and sisters who are not dependent.⁴⁴

A decree to the father and stepmother jointly, though the stepmother was not a dependent, was not prejudicial to the employer,

40. *Skarpeletzos v. Counes & Raptis Corp.*, 228 N. Y. 46, (1920), 126 N. E. 268, 5 W. C. L. J. 720; *Casello v. McCormack*, 180 N. Y. App. Div. 94, 167 N. Y. Supp. 564, 16 N. C. C. A. 219; *Skiliaris v. United States Railroad Administration*, 191 App. Div. 928, 180 N. Y. Supp. 649, (Mar., 1920), 5 W. C. L. J. 724.

41. *Swift & Co. v. Indus. Comm.*, 289 Ill. 132, 123 N. E. 767, 4 W. C. L. J. 163; *Wangler Boiler & Sheet Metal Works v. Indus. Comm.*, 287 Ill. 118, 122 N. E. 366; *Woodcock v. Walker*, 170 App. Div. 4, 155 N. Y. Supp. 702.

42. *G. H. Hammond v. Indus. Comm.*, 288 Ill. 262, 123 N. E. 384, 4 W. C. L. J. 176.

43. *Texas Employers Ins. Assn. v. Boudreaux*, Tex. Civ. App., —, (1919), 213 S. W. 674, 4 W. C. L. J. 561.

44. *Matecny v. Vierling Steel Works*, 187 Ill. App. 448.

Note: For cases on double indemnity in case of death see *Employers Wilful Misconduct*, § 287 ante.

where the father, had the suit been instituted alone in his name, would have been entitled to the full amount awarded.⁴⁵

Where deceased left a mother, one sister and two brothers dependent upon him and to whom he had given \$30 per month from his salary of \$55, and board at \$18 per month, the commission in apportioning the award said: "It is apparent from this statement of facts that the mother and also the sister and brothers were totally dependent upon the deceased. Compensation is accordingly awarded to the sister and two brothers 15 per cent. share and share alike, and to the mother 25 per cent. This award to the sister and brothers of 15 per cent, instead of 30 per cent, which would be authorized under section 10 (F) of the law, is made in order that the total amount of compensation paid to the family may not be at a higher rate than the contributions made by the deceased to the support of the family during the year preceding the injury. This variation from the award authorized by section 10 (F) is made in accordance with the provisions of section 10 (J), which is to the effect that 'in case there are two or more classes of persons entitled to compensation under this section, and the apportionment of such compensation above provided would result in injustice, the commission may, in its discretion, modify the apportionment to meet the requirement of the case.'"⁴⁶

§ 389. **Deductions.**—Under the Illinois Act, the amount of compensation for the death of a coal miner is to be computed upon his gross earnings, not upon the gross earnings less the amount deducted by the employer for union dues and other matters.⁴⁷

Expenses incurred by a parent on account of a deceased minor son are pertinent in determining the fact of dependency, under the Massachusetts Act, but are irrelevant in determining the amount of compensation to be paid after the dependency has been established.⁴⁸

45. *Milne v. Sanders*, — Tenn. —, 228 S. W. 702.

46. *In re Grady Murray*, 3rd A. R. U. S. C. C. 100.

47. *Springfield Coal Mining Co. v. Indus. Comm.*, 291 Ill. 408, 126 N. E. 133, 5 W. C. L. J. 675.

48. *Freeman's Case*, 233 Mass. 287, 123 N. E. 845, (1919), 4 W. C. L. J. 498; *Dembinski's Case*, 231 Mass. 261, 3 W. C. L. J. 151, 120

Compensation paid an injured employee, pursuant to a voluntary agreement with the employee cannot be credited, at the employee's death, against compensation awarded a dependent.⁴⁹ Nor can moneys paid in excess of the advancements allowed by statute for medical purposes, when they are voluntarily paid.⁵⁰

Where the mother of the deceased claimed compensation under the Michigan Act, she thereby clothed the employer with a right of action against the wrongdoer, and if he failed to protect his rights he cannot have deducted from the award the sum received by the mother as result of a suit brought under the Survival Act by the administrator of the deceased. The mother's election did not release the third person from liability under the Survival Act to the deceased's administrator for negligent killing.⁵¹

Under the Illinois Act, deductions need not be made for expenses incurred in keeping the minor son, when determining dependency, since the parents are under a legal obligation to support him.⁵²

Under the Kansas Act, it is held to the contrary, and dependency is not established unless the wages or contributions of the minor exceed the cost of his maintenance.⁵³

"In an action under the Workmen's Compensation Law by the parents of a minor son to recover compensation for his death, it was shown that his earnings, which averaged \$17.45 per week, were turned over in full to his parents, and that the parents were

N. E. 856; *Farnsworth Colliery Co., Ltd., v. Hall*, (1911), C. 665, 4 B. W. C. C. 313, 6 N. C. C. A. 243.

49. *Jackson v. Berlin Const. Co.*, 93 Conn. 155, 105 Atl. 326, 3 W. C. L. J. 224.

50. *Crescent Coal Co. v. Indus. Comm.*, 286 Ill. 102, 121 N. E. 171, 3 W. C. L. J. 240.

51. *Vereeke v. City of Grand Rapids*, 203 Mich. 85, 168 N. W. 1019, 2 W. C. L. J. 917.

52. *Metal Stamping's Corp. v. Indus. Comm.*, 285 Ill., 528, 121 N. E. 258, 3 W. C. L. J. 258; *In re Peters*, 64 Ind. App. —, 116 N. E. 848, 16 N. C. C. A. 183; *Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, 90 Atl. 1025, 13 N. C. C. A. 315; *In re Murphey*, 224 Mass. 592, 5 N. C. C. A. 716, 113 N. E. 283.

53. *McGarvie v. Frontenac Coal Co.*, 103 Kan. 586, 175 Pac. 375, 3 W. C. L. J. 46.

partially dependent upon such earnings; that he paid no board, but that the expense to his parents for his support was \$5 per week. The court held, that in ascertaining the average yearly earnings of the minor, and fixing the degree of dependency of the parents, the employer is not entitled to a credit or deduction for the expense of the minor's board and support.⁵⁴

Where a father's earnings, after making proper deductions for the contributions of his son, are sufficient to support his family, a case of dependency by the family upon the son has not been established.⁵⁵

Insurance carried by the employer on the life of the employee without expense to the insured, should be allowed as a credit to the employer in making an award, if it is shown that such insurance has been paid to the widow.⁵⁶

Upon the modification of an original award so as to make it include the loss of both legs instead of one, the employer is entitled to have credit given him for payments made under the first award.⁵⁷

Salary paid as such up to the time of the employee's death, is not to be credited to the employer and cannot be deducted from the compensation awarded where it was voluntarily paid.⁵⁸

§ 390. **Evidence.**—In the matter of dependency, it is necessary to establish by competent evidence that the claimants stood in that relation to the decedent, and statements of a brother and sister of deceased, who asserted that he sent money to his family, is not competent evidence, when there is nothing to show that they knew any of the facts and there are no corroborating cir-

54. *Slater v. Ismert Hincke Milling Co.*, — Kans. — (1920), 189 Pac. 908, 6 W. C. L. J. 164.

55. *Moll v. City Bakery*, 199 Mich. 670, 165 N. W. 649, 1 W. C. L. J. 391, 16 N. C. C. A. 186.

56. *American Smelting & Refining Co. v. Cassil*, — Neb. —, (1920), 175 N. W. 1021, 5 W. C. L. J. 552.

57. *Saddlemire v. Amer. Bridge Co.*, — Conn. —, (1920), 110 Atl. 63, 6 W. C. L. J. 130.

58. *Ogden v. Indus. Comm.*, — Utah —, (1920), 193 Pac. 857, 7 W. C. L. J. 249.

circumstances; nor is a statement of the "officer in charge" as to the birth of the decedent and claim of dependency by alleged parents, competent evidence of the existence of parents; a certified copy of the record being essential.⁵⁹

Voluntary contributions of money or support are not necessarily evidence of dependency or of the extent of dependency.⁶⁰

But the fact that the contributions were voluntarily given towards the support of one whom the deceased employee was not legally obliged to maintain, will not deprive such recipient of the character of dependent.⁶¹

A statement from a deceased employee's brother that he had received from his parents in Italy letters stating that the parents were living on remittances sent from America by the brother, is not evidence that the parents were actually dependent upon these remittances. Nor are unauthenticated certificates of the "Mayor" and "the official" of a town in Italy, stating that the parents were exclusively dependent upon deceased for their support, and further stating that they existed upon the fruits of small jobs and owned their own home and other property, sufficient to establish dependency.⁶²

Evidence that a minor daughter turned over her wages to her mother is not, in the absence of showing that the mother was dependent upon her, sufficient to support a claim of dependency under the New York Act.⁶³

Evidence that a son in America sent sums of money to a father in Italy, is not sufficient to establish dependency, in the absence of a showing that the father was dependent upon these contributions.⁶⁴

59. *Bonnano v. Metz Bros.*, 188 App. Div. 380, 177 N. Y. S. 51, (1919), 4 W. C. L. J. 427.

60. *Miller v. Riverside S. & C. Co.*, 189 Mich. 360, 155 N. W. 462.

61. *Walz v. Holbrook, C. & R. Corp.*, 170 App. Div. 6, 155 N. Y. Supp. 703.

62. *Pifumer v. Rheinlein & Haas, Inc.*, 187 App. Div. 821, 175 N. Y. S. 848, (1919), 4 W. C. L. J. 136.

63. *Frey v. McYoughlin Bros., Inc.*, 187 App. Div. 824, 175 N. Y. S. 873, (1919), 4 W. C. L. J. 133.

64. *Peabody Coal Co. v. Indus. Comm.*, 287 Ill. 407, (1919), 122 N. E. 843, 5 W. C. L. J. 27.

Evidence that the husband and wife are living together at the time of the accident is sufficient to establish dependency.⁶⁵

Where a husband is unable to support his wife, evidence that she is living apart from him in accordance with an agreement that she earn wages, is not sufficient to establish desertion.⁶⁶

A claim for total dependency of a widow in Italy upon her husband in the United States, cannot be supported upon the evidence which shows that the husband owned the house that the widow was living in in Italy. If the house was of no value, this fact should be shown in evidence.⁶⁷

The commission may receive affidavits of the father and mother of the deceased, residing in Ireland, and taken before a commissioner of oaths of the state of New York, as bearing upon their dependency.⁶⁸

An admission by a father that the contributions of the son were not sufficient to pay his board and clothing is damaging evidence, but is not conclusive upon the board when the statement was out of harmony with other undisputed evidence.⁶⁹

The question of dependency of a mother upon a married son, who was living with his wife at the time of the injury, must be determined upon the facts as they existed at the time of the accident, and testimony regarding contributions before marriage must be excluded.⁷⁰

A signed statement, given at the beginning of employment that there was no one depending upon the deceased, constitutes nothing more than evidentiary matter, the probative value of which

65. *Doherty v. Grosse Isle Tp.*, 205 Mich. 592, (1919), 172 N. W. 596, 4 W. C. L. J. 222.

66. *James Black Dry Goods Co. v. Iowa Indus. Comm.* — Iowa —, 173 N. W. 23, (1919), 4 W. C. L. J. 379.

67. *In re Derinza*, 229 Mass. 435, 118 N. E. 942, 1 W. C. L. J. 795, 16 N. C. C. A. 87.

68. *Moran v. Rodgers and Hagerty, Inc.*, 180 App. Div. 821, 168 N. Y. S. 410, 1 W. C. L. J. 694, 17 N. C. C. A. 263.

69. *State ex rel. Ernest Fleckenstein Brg. Co. v. District Court of Rice County*, 134 Minn. 324, 159 N. W. 755, 16 N. C. C. A. 189.

70. *Birmingham v. Westinghouse, Elect. & Mfg. Co.*, 180 N. Y. App. Div. 48, 167 N. Y. S. 520, 16 N. C. C. A. 189.

is to be determined by the commission, and an actual finding that there were dependents is conclusive.⁷¹

Evidence that a son in the United States sent money to his parents in Italy, without any further testimony as to the actual dependency of such parents upon the son's contributions, is not sufficient to sustain a claim of dependency.⁷²

In a proceeding for compensation by an alien woman on the death of a man whom she claimed was her husband, it was held that a so-called protocol, purporting to contain testimony of the plaintiff and her witnesses taken before a probate judge in a foreign country, where the alleged wife resided, could not be admitted as a foreign affidavit, and even if it was authenticated as a foreign affidavit it could not be substituted to prove, in a contested case, facts which can only be shown by competent oral evidence or legal depositions, taken after notice to the opposing parties. Therefore, in the absence of witnesses to testify to knowing deceased in Austria and in America, and who could identify him as the plaintiff's husband, the evidence was insufficient to establish the claimant's right to compensation.⁷³

Where the only testimony, to establish a claim of dependency by an alien father, was to the effect that the deceased had requested from his depository an advancement of money, saying that he wished to send it to his father, the evidence was insufficient to establish a claim of dependency.⁷⁴

Testimony of a witness that knew the deceased in Italy and in the United States, that the parents of the deceased were dependent upon him and that he sent them money from the United States to the knowledge of the witness, for he, acting as interpreter, purchased money orders for the deceased, saw him place the money order in an envelope, addressed to the father in Italy, and mail

71. Northern Redwood Lbr. Co. v. Indus. Acc. Comm., 34 Cal. App. 2, 166 Pac. 828, 16 N. C. C. A. 189.

72. Poccardi v. State Compensation Com'r 82 W. Va. 497, 91 S. E. 663, 16 N. C. C. A. 217.

73. Lobuzek v. American Car and Foundry Co., — Mich. —, 161 N. W. 139, 14 N. C. C. A. 423.

74. Western Indemnity Co. Inc. v. Indus. Acc. Comm. of Cal., 35 Cal. App. 104, 169 Pac. 261, 16 N. C. C. A. 223.

the letter, was sufficient to establish dependency of the alien parents.⁷⁵

A mere statement by the brother-in-law of the deceased that at different times the deceased had told him of sending money home to his parents, was not sufficient evidence nor competent evidence of the dependency of deceased's parents; as hearsay testimony regarding the sending of money in no way established the dependency of the deceased's parents, nor did it show that the money was not sent for the purpose of discharging a debt the deceased owed to his parents, or for other purposes.⁷⁶

Evidence that a deceased employee contributed to the support of his mother, and that while not immediately dependent upon him for support she was likely to become dependent because of advancing years, lack of property and regular employment, it could not, as a matter of law, be said that such evidence did not tend to prove a condition of partial dependency.⁷⁷

Where parties agree upon stated facts, and after an objection has been filed to the claimant's right to compensation, the introduction of other evidence than the stipulated facts is not error, when there was no objection made at the time.⁷⁸

Statements of a deceased person of his intention to marry the mother of an illegitimate posthumous child are admissible on the questions of dependency, and on the issue of paternity, as well as admissions against interests, and a claim of dependency may be based solely upon such declarations.⁷⁹

75. *Victor Chemical Works v. Indus. Bd. of Ill.*, 274 Ill. 11, 13 N. C. C. A. 552, 113 N. E. 173.

76. *Tirre v. Bush Terminal Co.*, 127 App. Div. 386, 158 N. Y. S. 883, 12 N. C. C. A. 64.

77. *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245, 9 N. C. C. A. 583.

78. *Vereeke v. City of Grand Rapids*, 184 Mich. 474, 151 N. W. 723, 9 N. C. C. A. 583.

79. *Lloyd v. Powell Duffryn Steam Coal Co. Ltd.*, (1914), A. C. 733, 7 B. W. C. C. 330, 9 N. C. C. A. 588.

Note: See Chapter XIV, Evidence.

§ 391. **Burden of Proof.**—Persons claiming death benefits under the Workmen's Compensation Act, are bound to bring themselves within the language of the act.⁸⁰

The burden of proving the elements necessary to bring the beneficiary within the provisions of the Illinois Act of 1913, Sec. 7, par. (b), as amended by Laws of 1915, p. 401, providing for compensation to employees' parents, rests upon the claimant.⁸¹

Where compensation is sought in favor of alien non resident parents, there must be actual proof that the parents are living, when they have not been heard from or of in seven years.⁸²

The fact that a man and woman lived together for ten months, is not sufficient evidence of a marriage, and this fact must be proved by the claimant.⁸³

The mere fact that a father receives money from his son and expends it, is not sufficient evidence to discharge the burden of proof of dependency.⁸⁴

§ 392. **Guardians.**—A guardian of a dependent minor child is the proper party to award compensation to for the child.⁸⁵

Compensation awarded to the infant children of a deceased workman may be paid to his widow, when she has been appointed their general guardian.⁸⁶

80. *Drummond et al. v. Isbell-Porter Co. et al.*, 188 App. Div. 374, 177 N. Y. S. 525, 4 W. C. L. J. 535, (1919); *Benjamin F. Shaw Co. v. Palmatory*, — Del. —, (1919), 105 Atl. 417, 3 W. C. L. J. 424; *In re Derinza*, 229 Mass. 435, 118 N. E. 942, 1 W. C. L. J. 795, 16 N. C. C. A. 87; *In re Sponatski*, 221 Mass. 526, 108 N. E. 466, L. R. A. 1916 A, 333; *In re Carroll*, 64 Ind. App. —, 116 N. E. 844.

81. *Peabody Coal Co. v. Indus. Comm.*, 289 Ill. 330, (1919), 124 N. E. 603, 5 W. C. L. J. 57; *In re Stewart*, — Ind. App. —, (1920), 126 N. E. 42, 5 W. C. L. J. 514; *In re Fierro's Case*, 223 Mass. 378, 111 N. E. 957.

82. *Keystone Steel & Wire Co. v. Indus. Comm.*, 289 Ill. 587, (1919), 124 N. E. 542, 5 W. C. L. J. 40.

83. *Fife Coal Co., Ltd., v. Wallace*, (1910), 2 B. W. C. C. 264, Ct. of Sess.

84. *Main Colliery Co. v. Davies*, 2 W. C. C. 108.

Note: See Chapter XIV, Evidence.

85. *Holmberg's Case*, 231 Mass. 144, 120 N. E. 353, 2 W. C. L. J. 899. this subject.

86. *Woodcock v. Walker*, 170 App. Div. 4, 155 N. Y. Supp. 702.

Under the Kentucky Act where a minor is employed in wilful violation of a statute, his guardian and not the Industrial Commission, has the right to elect whether to proceed under the act or in an action at law.⁸⁷

§ 393. **Dependency Under the Federal Act.**—Dependency is a question of fact under the Federal Act, to be determined by the facts of each particular case.⁸⁸

The amount contributed by deceased is not the only criterion for establishing dependency. The equitable if not legal claim of a parent upon his child for support makes it proper to consider the actual needs of the parent. "If that use of the farm was necessary to her support, then she would be, at least in part, dependent upon that, and that dependence would be recognized by permitting her to occupy the farm, as I have stated. * * * She had the right, so far as the construction of this statute is concerned, to keep that money at interest, depend upon the income from it, and treat herself as dependent upon her sons for whatever might be necessary for her support over and above that income. * * * There is a statement here that if the income of the relative claiming to be dependent is less than \$500.00 per year, that is to be regarded as making him or her dependent. * * * In the opinion of the court, it depends upon the circumstances of each case. The mother is entitled to support according to the style in which she has been living. If that has been humble and inexpensive, the amount necessary to provide for her would necessarily be less than if she had been living in a more expensive style. The policy of the Government is not to reduce the surviving relatives of the soldier who had lost his life in the service down to the lowest standard of life, but is to construe the dependent clause, so far as the obligation of the statute is concerned, according to the mode in which the widow has been living. * * * It is for you to determine according to the

87. *Frey's Guardian v. Gamble Bros.*, — Ky. App. —, 1920, 221 S. W. 870, 6 W. C. L. J. 171.

88. *In re claim of Theodore Rock*, Op. Sol. Dep. C. & L. 573.

testimony whether she was adequately provided for, and in determining that you will look to what is necessary for her support.⁹⁰

Nor will it suffice to know the age, circumstance, position in life, and the earning capacity of the parent, but it must appear that the parent did in fact depend upon the deceased.⁹¹

So where deceased left a mother to whom he had contributed \$100.00 in two and one half years prior to his death, it was held that dependency was established.⁹² The same ruling was made where the contributions amounted to \$125.00 during the year prior to deceased's death, although the father owned real estate and had an income of \$1,200.00⁹³

A mother living in Ireland, who had three other sons and was a pensioner of the British Government, received small sums of money about May and Christmas of each year from the deceased. Upon this state of facts it was held that she was not a dependent upon deceased, who had left a widow.⁹⁴

Where a single man contributed large sums of money to his parents, who had five younger children to raise, it was held that dependency was established.⁹⁵

A grandmother of deceased, being old and destitute, was held to be a dependent, even though the deceased had never contributed to her support.⁹⁶

A promise of a youth to contribute to his parents, upon whose farm he had labored until entering the Government's employ, was held to establish dependency.⁹⁷

90. *United State v. Purdy*, 38 Fed. 902.

91. *In re Claim of Brauch*, Op. of Sol. Dep. C. & L. (1915), 576; *In re John F. Murphy*, 2nd A. R. U. S. C. C. 76; *In re Horace A. Pelletier*, 2nd A. R. U. S. C. C. 76; *In re Chas. A. Borrineau*, 2nd A. R. U. S. C. C. 77.

92. *In re Claim of Levi Belgrave*, Op. Sol. Dep. C. & L. (1915), 580.

93. *In re Leon Esselman*, (1915), Op. Sol. Dep. C. & L. 581.

94. *In re Claim of Frank Duffy*, Op. Sol. Dep. C. & L. (1915), 594.

95. *In re Claim of Jack Scott*, Op. Sol. Dep. C. & L. (1915), 595.

96. *Claim of Wm. F. Munn*, Op. Sol. Dep. C. & L. (1915), 597; *In re Claim of Juan Encias*, Op. Sol. Dep. C. & L. (1916), 601.

97. *In re Claim of Robert Harris*, Op. Sol. Dep. C. & L. (1915), 598.

Where the parents' age, physical condition and circumstances in general did not establish dependency, the mere fact that deceased contributed to them would not make them dependent.⁹⁸

Where a son, 18 years of age, living apart from his mother, did not contribute to her support, it was held that dependency was not shown.⁹⁹

While the Federal Act provides that 35 per cent shall be paid to a widower, who is totally dependent upon deceased at the time of his death, and makes no provision for partial dependency, the commission in its discretion may award compensation proportionately to the extent of dependency.¹

Where the decedent left a woman with whom he had cohabited after abandoning his wife, it was held that she was not a dependent although her son, by this putative father, was entitled to compensation.²

But where the deserted wife remarried and deceased contracted a common law marriage with another it was held that his common law wife was entitled to compensation.³

Where a stepson contributed to a stepmother, because she was unable to meet all her own expenses because of sickness, an award was made for one year, requiring the claimant to show at the end of the year whether or not dependency had terminated.⁴

A stepchild supported by his stepfather is a dependent, but this dependency ceases when the child's natural father, who had been divorced from the mother, assumes the obligation of support.⁵

One employed at two different occupations is entitled to have compensation based upon his total earnings from both employments.⁶

98. In re Claim of Wm. Rees, Op. Sol. Dep. C. & L. (1915), 599.

99. In re Claim of Chas. Jones, Op. Sol. Dep. C. & L. (1915), 602.

1. In re Ella C. Lloyd, 3rd A. R. U. S. C. C. 103.

2. In re George Young, 3rd A. R. U. S. C. C. 103.

3. In re Gus Green, 3rd A. R. U. S. C. C. 185.

4. In re Frederick C. Neilson, 3rd A. R. U. S. C. C. 102.

5. In re John David Anderson, 3rd A. R. U. S. C. C. 97.

6. In re Wm. H. Minnick, 3rd A. R. U. S. C. C. 100.

A daughter over eighteen years of age is not dependent merely because she is obligated to pay a debt that the father has promised to pay, for the compensation act does not aim to pay the debts of deceased persons.⁷

Dependency is to be determined as of the date of the accident, and where a father was dependent at that time, it is immaterial that subsequent to that time others have come to his relief.⁸

§ 394. **Adoption Under the Federal Act.**—Under the Federal Act a child must have been legally adopted before the foster parent is entitled to compensation as his dependent.⁹

“Adoption, like marriage, is a civil contract, and, as a general rule, following the opinion in the William A. Brinkley case under this act, where there are no circumstances which may raise a doubt of the relationship, where it appears that the deceased has lived with and supported a woman who claims to be, and was claimed by the deceased to have been the mother by adoption of such deceased, and where the reporting officer, as in this case, states that such relationship existed, it may safely be assumed that the relationship is established. Upon the question of proving dependence of the parent upon the deceased the opinion in the Brinkley case may again safely be followed, to the effect that a statement by the claimant is sufficient to establish such dependency. In this case claimant states that she necessarily depended upon the deceased, customarily receiving \$6 weekly out of his salary of \$1.75 a day.”¹⁰

An adopted child is entitled to the benefits of the Act.¹¹

§ 395. **To Whom Compensation of Children With a Surviving Parent is Paid.**—Where the deceased leaves no parent or widow,

7. In re Melvin B. Murphy, 3rd A. R. U. S. C. C. 101.

8. In re Arthur Rogers, 3rd A. R. U. S. C. C. 102.

9. In re claim of Charles Perkins, Op. Sol. Dep. C. & L. (1915), 579;
In re Claim of Juan Rodriguez, Op. Sol. Dep. C. & L. (1912), 551.

10. In re claim of Huff, Op. Sol. Dep. C. & L. (1915), 567.

11. In re claim of Asencien Estorga, Op. Sol. Dep. C. & L. (1915), 566.

but leaves a child entitled to compensation, and the acting Spanish Consul files an affidavit of claim on behalf of such child, such consular will be deemed to be acting in loco parentis, and his affidavit as the affidavit of the child.¹²

Where the widow of the deceased has been awarded compensation in her own behalf and in behalf of their child, and the widow dies, leaving the care of the child to a grandmother, the remainder of the year's compensation may be paid to such maternal grandmother for the use of the child.¹³

§ 396. **Illegitimate Children.**—"Notwithstanding, then, the generally accepted view, and the numerous decisions, in support of it, referred to at the outset, it is believed that the Secretary would be amply justified in holding that the children of a deceased employee, whether legitimate or illegitimate, at least if there is no reason to question the relationship, are entitled to the benefits of the compensation act. This would be no more than giving to the word 'child' its natural import. It would likewise give effect to the tendency noticeable in modern legislation, toward recognizing in illegitimates the same claims to parental care and support that belong, by natural right, to the young of any species. It would be sustained, moreover, by those authorities above cited, few in number but none the less persuasive, which announce what seems to be the more rational doctrine; and it would follow a principle of public policy which does not depend for its sanction upon the infliction of vicarious punishment on the innocent and the helpless. On the other hand, to hold, as many courts have done, that the use of the word 'child' in a statute, without any qualification indicating a restricted sense, always implies the issue of lawful wedlock, because in generations past the law regarded a bastard as *nullius filius* and heir to no one, is to adhere to a rule long after the reason for it has ceased to have point. Such an adherence to mere technicality, based on a legal fiction no longer operative, would be still less reasonable when dealing with a statute which, like the compensation act, is intended for a beneficial

12. In re claim of J. G. Redondo, Op. Sol. Dep. C. & L. (1915), 563.

13. In re claim of Jefferson, Op. Sol. Dep. C. & L. (1915), 564.

purpose and is expressly designed to relieve ordinary laborers and those dependent on them of the necessity of bearing the whole burden resulting from the inevitable accidents incident to the industry in which they are employed. Without saying of Congress what the court in Connecticut said of the legislature of that State, that it is 'a body made up generally of plain men,' it can be said that, in passing the compensation act, 'they made laws for plain men;' and it is at least fair to presume that they used the terms 'child' and 'children' in the statute in question 'in their common, popular signification, rather than with reference to any legal or technical sense,' and that they 'had as little reference to the technical meaning of words in the English common law as they had to the English law of inheritance.' The compensation act does not in any way touch the matter of inheritance. In my opinion, therefore, for the reasons given, and on the strength of some of the authorities cited, the word 'child' or 'children,' within the meaning of the compensation act, is not restricted to child or children born in wedlock, but includes illegitimate offspring as well. It is accordingly recommended that the claim of Edgar McDonald Harding, the illegitimate child of James F. Harding, deceased, be allowed."¹⁴

§ 397. **Who is the Widow of an Employee.**—The civil code of Panama does not make any provision for recognition of a common-law marriage, and a person depending upon the validity of a common-law marriage, performed in Panama, for the establishment of a claim of dependency must necessarily fail.¹⁵

A woman who lived in illicit relations with a man in Barbados, and bore three illegitimate children, is not a dependent.¹⁶

A woman divorced from an employee and given custody of the children is not a dependent, but may receive compensation as guardian of the children.¹⁷

A woman who has been divorced from her husband, is not his widow after his death.¹⁸

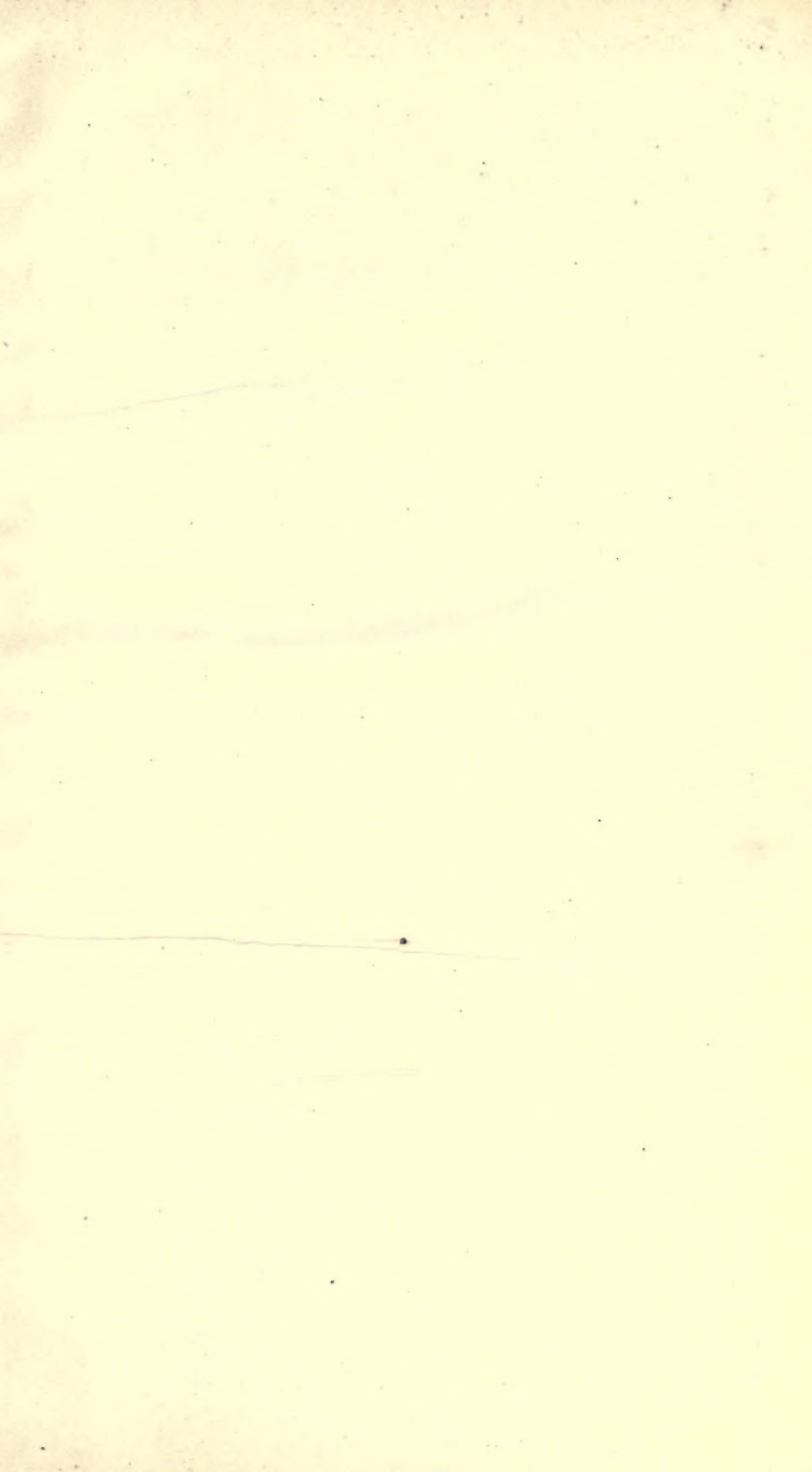
14. In re claim of J. Harding, Op. Sol. C. & L. (1915), 553.

15. In re claim of Stanely Howell, Op. Sol. Dep. C. & L. (1915), 549.

16. In re claim of Fitz Ogard, Op. Sol. Dep. C. & L. (1915), 550.

17. In re claim of Edward Niemeier, Op. Sol. Dep. C. & L. (1915), 551.

18. Op. Atty. Gen., 30 Am. & E. Ency. L. 521.



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